PVM I Associates, Inc. d/b/a King David Center and U.S. Management, Inc./I.I.M.S. *and* 1115 Nursing Home Hospital and Service Employees Union-Florida

International Union of Industrial Service Transport and Health Employees District 6 PVM I Associates, Inc. d/b/a King David Center and U.S. Management, INC./I.I.M.S. *and* 1115 Nursing Home Hospital and Service Employees Union-Florida.

Healthcare Services Group, Inc. *and* 1115 Nursing Home Hospital *and* Service Employees Union-Florida. Cases 12–CA–16368, 12–CA–16380–2, 12–CA–16425, 12–CA–16427, 12–CA–16454, 12–CA–16474, 12–CA–16523, 12–CA–16786, 12–CA–16809, 12–CA–16839, 12–CA–16380, and 12–CA–16762

August 6, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On February 29, 1996, Administrative Law Judge Robert C. Batson issued the attached decision. Respondents PVM I Associates, Inc. d/b/a King David Center and U.S. Management, Inc./I.I.M.S. (the Joint Employer Respondents) and the General Counsel filed exceptions and supporting briefs and the General Counsel filed an answering brief to the Joint Employer Respondents' exceptions.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions as modified below,[3] and to adopt the recommended Order, as modified and stated in full below.[4]

Respondent PVM I Associates, Inc. d/b/a King David Center (King David) operates a skilled nursing facility in West Palm Beach, Florida. Respondent U.S. Management, Inc./I.I.M.S. (U.S. Management) provides King David with certain nursing department employees, including certified nursing assistants (CNAs) and dietary employees pursuant to a contract with King David. King David and U.S. Management are joint employers of those employees. During the summer of 1993, the Union commenced an organizing campaign among the Joint Employer Respondents' CNAs and dietary employees, which continued for approximately 1 year. The Union won the election held on August 5, 1994.

The judge found, inter alia, that the Joint Employer Respondents violated Section 8(a)(1) of the Act by its supervisors' alleged surveillance of employees' union activities at a local restaurant and by Supervisor Celina Caprisecco's alleged interrogation of employee Jean Aliza; and that they violated Section 8(a)(3) and (1) of the Act by the alleged imposition of more onerous working conditions on employee Quetellie Jean-Baptiste and by her alleged "constructive suspension" for 1 week. The Joint Employer Respondents have excepted to those findings, among others. We find merit in these exceptions, and, for the reasons set forth in sections 1, 2, and 3 below, we shall dismiss those complaint allegations.

The General Counsel has excepted, inter alia, to the judge's failure to address certain complaint allegations pertaining to allegedly retaliatory reductions in staffing levels and working hours. We agree that this was error,

[1] In the representation case proceeding, the Board denied these Respondents' request for review of the Regional Director's determination that King David and U.S. Management are joint employers. In this proceeding, Joint Employer Respondents have not excepted to the judge's conclusion that they are joint employers.

[2] The Joint Employer Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In adopting the judge's finding that the Joint Employer Respondents unlawfully discharged Lude Duval under the pretext that she did not have her CNA certificate, we note that when the Joint Employer Respondents discovered that Joyce Neloms did not have her CNA certificate she was not similarly discharged but was placed in a position that did not involve patient care until she obtained the certificate. We also note that Duval subsequently obtained her CNA certificate. Because of this evidence of disparate treatment, the Joint Employer Respondents have not shown that they would have discharged Duval even absent her union activity.

The Joint Employer Respondents likewise have not demonstrated that they would have discharged Jean Aliza notwithstanding his union activity. They contend that Aliza was discharged for poor performance and insubordination but direct our attention to only one other incident in which a probationary employee was terminated for allegedly similar conduct. On the other hand, the record contains dozens of "employee counseling forms" noting performance deficiencies similar to those for which Aliza was terminated, but which did not result in termination. As for the alleged insubordination, we note that Aliza's warning for that infraction references termination only in the event of future outbursts, and that other employees who were counseled for being insubordinate were not similarly disciplined.

[3] The judge dismissed the complaint allegation that the Joint Employer Respondents unlawfully issued disciplinary warnings to employee Caty Joseph, and no party has excepted to that dismissal. Nevertheless, in his Conclusion of Law 10 (f), the judge named Joseph as a recipient of unlawful disciplinary warnings. We shall delete Joseph from that conclusion.

[4] The Respondent Healthcare Services Group, Inc. (Respondent Healthcare) provides laundry and housekeeping services to King David. The judge found that Respondent Healthcare violated Sec. 8(a)(5) and (1) by refusing to meet and bargain with the Union following an election held August 5, 1993, in a unit of laundry and housekeeping employees. Respondent Healthcare does not except to this finding. However, the General Counsel has excepted to the judge's failure to include in his recommended Order and notice a provision extending Healthcare's bargaining obligation for 1 year from the date Healthcare begins to bargain in good faith. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). We shall correct the Order and notice accordingly.

We shall also modify the judge's recommended Order in accordance with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

and for the reasons set forth in section 4 below, we shall remand to the judge those unresolved issues for appropriate findings and conclusions.

1. Alleged surveillance

In mid-July 1994,[5] Joint Employer Respondents' quality assurance director, Lisa Megill, and Nurse Supervisor Celina Caprisecco visited during lunchtime a pizza restaurant about a mile from the Joint Employer Respondents' facility. After they arrived, three union officials, including Marie Jean Phillippe, and unit employee Michelle Williams appeared for a scheduled—but unpublicized—union meeting. Phillippe and Williams were seated about 5 feet away from the Joint Employer Respondents' supervisors; other employees subsequently joined them. Megill and Caprisecco admitted recognizing Phillippe as a union representative who was attempting to organize the Joint Employer Respondents' employees. Phillippe testified that the supervisors remained at the restaurant for 90 minutes, drinking beverages and smoking, but that they were not served food.

Although the judge assumed that the supervisors did not know of the union meeting before they went to the restaurant that day, he stressed that they became aware of it after Phillippe and her group sat down at a nearby table. The judge concluded that, "Megill and Caprisecco prolonged their stay at the [restaurant] to observe the meeting and the employees in attendance there." Accordingly, the judge found that the Joint Employer Respondents violated Section 8(a)(1) of the Act by engaging in surveillance of its employees' union activities.

Contrary to the judge, we find that the record is insufficient to support a finding of unlawful surveillance. Thus, as the judge found, there is no evidence that Megill and Caprisecco knew about the union meeting in advance. Furthermore, these supervisors had a legitimate reason for being at the restaurant on their lunchtime and, for all the record shows, their presence on the same day as the union meeting was sheer coincidence. Although the judge noted that it is unclear whether they were served any food, he nonetheless stated he was "convinced" that the supervisors "prolonged their stay" in order to observe the union meeting. The judge's conclusion rests on pure speculation. Megill and Caprisecco clearly had a right to patronize the restaurant located only a short distance from the Joint Employer Respondents' facility, and nothing in the law required them to leave the premises when the union officials later arrived to conduct a union meeting.

As explained in *Gossen Co.*, 254 NLRB 339, 353 (1981), modified on other grounds 719 F.2d 1354 (7th Cir. 1983):

> Not all instances where employer representatives are at or in the vicinity of the union activities of their subordinate employees amount to unlawful surveillance. Thus, where purely fortuitous circumstances bring such parties together there is no dogmatic legal principle by which the employer would be declared to have violated the Act.

In dismissing the surveillance allegation there, *Gossen Co.*, 254 NLRB at 353, also quoted from an earlier holding in *Atlanta Gas Light Co.*, 162 NLRB 436, 438 (1966), in which the Board stated that:

> [the employer representative's] mere presence, without more specific evidence that it was not for a legitimate purpose, or that it was for the purpose of observing the meeting, establishes neither surveillance of the meeting by him, nor a reasonable basis for an impression of surveillance in the minds of employees in attendance at the meeting.

In short, the evidence here shows that Megill's and Caprisecco's presence at the restaurant on the same day as the union meeting was the result of "purely fortuitous circumstances."[6] There is no reason that they had to leave the restaurant once the union representatives and an employee arrived there to conduct a union meeting. Accordingly, we find that the General Counsel has not established that the Joint Employer Respondents engaged in surveillance.[7]

2. Alleged interrogation

In early January, employee Jean Aliza began wearing a union button on his shirt or jacket while at work at the Joint Employer Respondents' nursing home. On the first day that Aliza wore the button, Caprisecco came into the room where Aliza was bathing a patient and, after inquiring about the patient, pointed a finger at the button and "asked . . . what is this?" Aliza replied that it was a button and suggested that Caprisecco read it. Caprisecco asked, "What the Union?" and walked away.

This evidence shows that Aliza was an open union supporter who wore a button bearing the Union's insignia at work. Caprisecco merely asked Aliza about the button as he attended to a patient and then, after Aliza beckoned her to read it, made a vague inquiry about the Union. Nothing in this exchange was remotely coercive nor could it reasonably be found to have had a tendency to interfere with Aliza's exercise of Section 7 rights. Thus, there cannot be any grounds for finding a violation on this allegation. *Rossmore House*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel Employees Local 11 v.*

[5] All dates are in 1994, unless otherwise noted.

[6] *Standard Products Co.,* 281 NLRB 141, 151 (1986), modified on other grounds 125 LRRM 3246 (4th Cir. 1987) (no violation where employer had legitimate business reason for presence at site of union meeting).

[7] Compare *Dayton Hudson Corp.*, 316 NLRB 85, 85–86 (1995), where the Board reversed the judge and found that the employer engaged in unlawful surveillance based on evidence that a group of managers had followed the employees to the restaurant.

NLRB, 760 F.2d 1006 (9th Cir. 1985); accord: *Santa Rosa Blueprint Service*, 288 NLRB 762 (1988).

3. Jean-Baptiste's alleged assignment to more onerous working conditions and alleged constructive suspension

Quetellie Jean-Baptiste has worked for the Joint Employer Respondents as a certified nurse assistant since March 1992. She signed a union card and began wearing a union button on her uniform about 1 month before the August 5 election. About 2 weeks before the election, Jean-Baptiste's immediate supervisor, Yves Waterman, told her that Quality Assurance Director Megill had a list of names, that Megill knew who would be voting for the Union, and that those who voted for the Union "will be fired."

After the election, on August 11, Megill issued Quettelie Jean-Baptiste a written warning for speaking Creole in the kitchen the previous day.[8] Jean-Baptiste claimed that she had been on break when this incident had occurred and refused to sign the form. Megill replied that she did not care and that the Joint Employer Respondents would terminate Jean-Baptiste if she received another written warning. Later that same day, the Joint Employer Respondents transferred Jean-Baptiste from the unit where she had worked for over 2 years to the acute care section. Jean-Baptiste testified that she was unfamiliar with the patients in the acute care section and that, already upset about the "write up" she had received, she developed a "bad headache" after she began working in the new area.

Thereafter, while working on August 14, Jean-Baptiste had an "anxiety" attack in which she hyperventilated, fell to the floor, and rolled around. Jean-Baptiste's husband was called and he took her to the hospital, where a physician treated and released her. Consistent with the Joint Employer Respondents' usual procedure, Director of Nursing Betty Whelan required Jean-Baptiste to obtain a physician's statement regarding her physical and mental health before returning to work. It took Jean-Baptiste 7 days to produce this statement and therefore she missed a week's work before returning to her job. The Joint Employer Respondents did not pay Jean-Baptiste for the days she was absent.

The judge found, inter alia, that the Joint Employer Respondents violated Section 8(a)(1) of the Act by Waterman's conduct in threatening Jean-Baptiste with discharge and by creating the impression of surveillance in referring to a list of names and stating Megill knew who would be voting for the Union, and violated Section 8(a)(3) and (1) of the Act by issuing Jean-Baptiste a written warning for speaking Creole and by imposing more onerous working conditions in transferring her to the acute care unit. Because he further found that the Joint Employer Respondents' transfer of Jean-Baptiste and its issuance of an unjustified written warning "brought about" Jean-Baptiste's anxiety attack, the judge concluded that the 7 days of work that Jean-Baptiste missed was "an unlawful constructive suspension," further violating Section 8(a)(3) and (1) of the Act, and awarded her backpay for that period.

Although we agree with the judge that the Joint Employer Respondents committed violations of the Act in threatening Jean-Baptiste with discharge, creating an impression of surveillance, and issuing a written warning to her, we do not agree that the Joint Employer Respondents unlawfully imposed more onerous working conditions on Jean-Baptiste by transferring her to the acute care section in its facility. Critically, there is no showing that the work performed by certified nurse assistants in this section was more burdensome, undesirable, or unpleasant than the duties that Jean-Baptiste had performed as a certified nurse assistant in another area of the facility for the previous 2 years. The only evidence on the issue is that Jean-Baptiste was "unfamiliar" with the patients in the acute care section.

We also disagree with the judge's finding that Jean-Baptiste was "constructively suspended" for 7 days. The judge implicitly analogized this alleged violation to a constructive discharge. The Joint Employer Respondents' actions, however, do not rise to the level required under that standard.[9] The Board has held that, to establish constructive discharge, the General Counsel must prove that "the employer imposed *intolerable* work conditions," as well as that the change in conditions was attributable to union activity. *Groves Truck & Trailer*, 281 NLRB 1194, 1195 (1986). (Emphasis added.) In *Crystal Princeton Refining Co.*, 222 NLRB 1068 (1976), the Board emphasized that, "the burdens imposed upon the employee must cause, and be intended to cause, a change in working conditions so *difficult or unpleasant*, as to force him to resign." (Emphasis added.) Further the Board has explained that a constructive discharge must be a reasonably foreseeable outcome of the institution of intolerable working conditions. *Aero Industries,* 314 NLRB 741, 742 (1994). The courts have similarly so held, as stated in *NLRB v. Grand Canyon Mining*, 116 F.3d 1039, 1049 (4th Cir. 1997), enfg. 318 NLRB 748 (1995), that:

> In order to prove constructive discharge, the General Counsel must establish: (1) that the employer made the employee's working conditions intolerable; (2) that the employer intentionally made the conditions intolerable; and (3) that the employer did so because of the em-

[8] We adopt the judge's finding that the Joint Employer Respondents' rule prohibiting employees from speaking Creole was overly broad and that the Joint Employer Respondents disparately enforced that rule in any event.

[9] We know of no case in which the Board has found a violation of the Act on a "constructive suspension" theory. However, we need not decide whether such a violation could ever be found, since the facts in this case do not support the General Counsel's theory in any event.

ployee's union activities. See *NLRB v. Bestway Trucking, Inc.*, 22 F.3d 177, 181 [22 LRRM 2206] (7th Cir. 1994); J.*P. Stevens & Co. v. NLRB*, 461 F.2d 490, 494 [80 LRRM 2609] (4th Cir. 1972).

Applied to the present constructive suspension claim, the test would be whether conditions were forseeably so intolerable as to provoke the anxiety attack that resulted in Jean–Baptiste's loss of 1week's work.

Although Jean-Baptiste's reassignment to the acute care section may have been attributable to her union activity as the judge found, there is no evidence that the working conditions there were either more onerous or "intolerable," a necessary predicate to establishing constructive action, or even that the Joint Employer Respondents expected Jean-Baptiste to perform more difficult assignments than other certified nurse assistants assigned to this area.[10] Indeed, Jean-Baptiste went on working for the Joint Employer Respondents in the acute care section when she returned after her medical absence. Moreover, the General Counsel offers no evidence that the Joint Employer Respondents intended to cause the "anxiety" attack suffered by Jean-Baptiste or that it was a reasonably foreseeable consequence of the change of assignment. Accordingly, the complaint allegation relating to constructive suspension, shall be dismissed.

4. Changes in CNA staffing levels and working hours

The complaint alleges that the Joint Employer Respondents unlawfully reduced the staffing levels of CNAs in retaliation for a union organizing drive among CNAs and dietary employees during the summer of 1994. The complaint also alleges that the Joint Employer Respondents reduced the work hours of CNA Marie Pierre Louis in retaliation for her union activity. Although the parties presented evidence on these issues, the judge did not make any credibility resolutions or rule on these specific allegations.[11]

Because the issues involve factual determinations about Joint Employer Respondents' staffing requirements during that time and those determinations may require credibility resolutions, we shall sever these allegations and remand them to the judge for his findings and conclusions on these issues.[12]

[10] See *Purolator Products,* 270 NLRB 694, 694–695 (1984), enfd. 121 LRRM 2120 (4th Cir. 1985) (unpublished), in which the Board reversed a judge and found that the employer had not violated Sec. 8(a)(3) and (1) of the Act by assigning employee Raeford to different jobs in the absence of evidence that they were "more onerous" to perform.

[11] We find that the judge's Conclusion of Law 10(a), which refers to the Joint Employer Respondents' increasing the employees' work load, does not clearly address the complaint allegations noted above.

[12] The Joint Employer Respondents have also excepted to the judge's finding that they violated Sec. 8(a)(3) and (1) when they discharged Luders Estril for allegedly failing to call in when he was going to be absent. In his decision, the judge cited testimony and the arguments of the parties, but failed to reconcile the conflicts in the testimony or provide sufficient rationale to support his conclusion. Accordingly, we shall remand the matter to the judge for the sole purpose that he elucidate the basis for his finding that Estril was discriminatorily discharged.

ORDER

The National Labor Relations Board orders that

A. Respondent PVM I Associates, Inc. d/b/a King David Center and U.S. Management, Inc./I.I.M.S., West Palm Beach, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against its employees because of their membership in, or activities on behalf of, 1115 Nursing Home Hospital and Service Employees Union-Florida or any other union, or because they engage in other protected concerted activities.

(b) Coercively interrogating employees as to their own or other employees' activities on behalf of the Union.

(c) Creating among its employees the impression that their union activities are under surveillance.

(d) Threatening its employees with discharge, suspension, or other unspecified reprisals because they engage in activities on behalf of the Union.

(e) Promulgating and enforcing a rule prohibiting its employees from conversing in their native Creole language except on break and in break areas.

(f) Calling its employees "troublemakers" and threatening them with disciplinary warnings because they engage in activities on behalf of the Union.

(g) Interfering with its employees attempts to engage in union activity by more closely monitoring their work performance.

(h) Threatening to, and changing, work schedules because employees engaging in union activity.

(i) Rescinding previously granted schedule accommodations because of its employees union activities.

(j) Attempting to remove union insignia from its employee clothing.

(k) Issuing disciplinary warnings to its employees because they engaged in activities on behalf of the Union.

(l) Permitting International Union of Industrial Service Transport and Health Employees District 6 access to its premises for purpose of campaigning while denying 1115 access to its premises for same reason.

(m) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Jean Aliza, Lude Duval, Marie Larose, Ernest Duval, Marie Pierre Louis, Michelle Williams, and Carline Dorsica full reinstatement to their former jobs or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges previously enjoyed.

(b) Make Jean Aliza, Lude Duval, Marie Larose, Ernest Duval, Marie Pierre Louis, Michelle Williams, and Carline Dorsica whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, suspensions or discipline, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges, suspensions and discipline will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix A."[13] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since the date of the unfair labor practices.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. Respondent Healthcare Services Group, Inc., West Palm Beach, Florida, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Refusing and failing to bargain with 1115 Nursing Home Hospital and Service Employees Union-Florida as the exclusive representative of the employees in an appropriate unit pursuant to Section 9(a) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with 1115 Nursing Home Hospital and Service Employees Union-Florida as the exclusive bargaining representative of the employees in the appropriate unit and if an agreement is reached as to wages, hours, and other terms and conditions of employment embody the understanding in a signed written document. The appropriate unit is:

> All full-time and regular part-time housekeeping and laundry employees employed by Respondent at King David Center in West Palm Beach, Florida; excluding all other employees, guards and supervisors as defined in the Act.

(b) Within 14 days after service by the Region, post copies of the attached notice marked "Appendix B."[14] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Healthcare to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its won expense, a copy of the notice to all current and former employees employed by the Respondent at any time since the date of the unfair labor practices.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that Case 12–CA–16454 be severed and remanded to the judge to elaborate on his rationale for finding that the Respondent violated Section 8(a)(3) and (1) when it discharged Luders Esteril and that Case 12–CA–16786 be severed and remanded to the judge for findings of fact and conclusions of law on the issue of whether the Respondent reduced the staffing levels of certified nurse assistants in general, and Marie Pierre Louis in particular, in retaliation for their support for the Union. The administrative law judge shall prepare a Supplemental Decision containing such credibility resolutions, findings, conclusions, and recommendations as deemed necessary, consistent with this remand Order. Following service on the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall apply.

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER FOX, dissenting in part.

I agree with my colleagues with respect to their adoption of most of the violations of Section 8(a)(1), (3), and (5) found by the judge.[1] Contrary to the majority, however, I would also adopt the judge's findings that the Joint Employer Respondents violated Section 8(a)(1) by surveilling a union organizing meeting at a local Pizza Hut restaurant and Section 8(a)(3) and (1) by transferring Quettelie Jean-Baptiste to a more onerous work assignment and by constructively suspending her.

The majority notes that Quality Assurance Director Megill and Supervisor Caprisecco had a legitimate reason for being at the restaurant on their lunchtime and that the fact that a union meeting happened to take place at the same time was sheer coincidence. I would agree if the evidence stopped there. However, as the judge found, having chanced up on the union meeting, the two management officials prolonged their lunch well beyond that which they normally took. (Caprisecco testified that she "very rarely took lunch," let alone a lunch that lasted nearly 2 hours.) I therefore would find that Caprisecco and Megill extended their time beyond the normal lunchbreak for the purpose of surveilling the union meeting.

The majority disagrees that the Joint Employer Respondents' transfer of Quetellie Jean-Baptiste to the acute care wing of the Joint Employer Respondents' facility violated Section 8(a)(3) and (1) of the Act or that she was constructively suspended for 7 days. In so doing, however, the majority fails to view these actions in the context of the Joint Employer Respondents' other unfair labor practices against her, which they find. Thus, the majority agrees that the Joint Employer Respondents threatened Jean-Baptiste with discharge, created the impression of surveillance by telling her that the Joint Employer Respondents knew who would be voting for the Union and that they would get in trouble, and discriminated against her by issuing her a written warning for speaking Creole. On the very same day as the unjustified warning, the Joint Employer Respondents transferred an already upset Jean-Baptiste to a job with which she was unfamiliar and followed behind checking her work 5 minutes after she finished with each patient.[2] Under these circumstances the judge found, and I agree, that the transfer constituted an imposition of more onerous working conditions against Jean-Baptiste in retaliation for her support of the Union. Moreover, when the Joint Employer Respondents' actions that day provoked Jean-Baptiste to suffer an anxiety attack, its insistence that she obtain a doctors release before she could return to work was tantamount to suspending her for an event which it had provoked and which was beyond her control. I would find that this was an effort to further punish her for her support for the Union. Accordingly, I dissent from the majority's reversal of the administrative law judge's finding on this issue.

[1] In view of the fact that it is cumulative, I find it unnecessary to decide whether Caprisecco's questioning Jean Aliza about his union button constituted unlawful interrogation.

[2] Prior to her transfer, her supervisor would check on her work once or twice per shift.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively interrogate our employees as to their own or other employees' union activities or support.

WE WILL NOT create the impression among our employees that their union activities are under surveillance.

WE WILL NOT threaten our employees with discharge, suspension, or other unspecified reprisals because they engage in activities on behalf of the Union.

WE WILL NOT promulgate or enforce a rule prohibiting our employees from conversing in their native language in order to restrict their union activities.

WE WILL NOT call our employees "troublemakers" and threaten them with discipline because they demonstrate support for the Union.

WE WILL NOT interfere with our employees' attempts to engage in union activity by more closely monitoring their work activities.

WE WILL NOT threaten to, and change, our employees work schedules because they engage in union activities.

WE WILL NOT rescind previously granted schedule accommodation because our employees engage in union activities.

WE WILL NOT attempt to remove union insignia from our employees' clothing.

WE WILL NOT issue disciplinary warnings to our employees because they engage in activities on behalf of, the Union.

WE WILL NOT discharge or suspend our employees because of their membership in, or activities on behalf of 1115 Nursing Home, Hospital and Service Employees Union–Florida or any other union because they engage in activities on behalf of the union.

WE WILL NOT permit an intervening union access to our facility for union campaign purposes while denying 1115 Nursing Home, Hospital and Service Employees Union–Florida access to our facility for that purpose.

WE WILL NOT in any other manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Jean Aliza, Lude Duval, Marie Larose, Ernest Duval, Marie Pierre Louis, Michelle Williams, and Carline Dorisco full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority and any other rights and privileges previously enjoyed.

WE WILL make Jean Aliza, Lude Duval, Marie Larose, Ernest Duval, Marie Pierre Louis, Michelle Williams, and Carline Dorisco whole for any loss of earnings and other benefits suffered as a result of our unlawful conduct, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove form our files any reference to the unlawful conduct against these employees, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that this unlawful conduct will not be used against them in any way.

PVM I ASSOCIATES, INC. D/B/A KING DAVID CENTER AND U.S. MANAGEMENT, INC./I.I..M.S.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain with 1115 Nursing Home Hospital & Service Employees Union-Florida on request as the duly certified collective-bargaining representative of our employees in the appropriate unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their rights guaranteed by Section 7 of the Act.

WE WILL recognize, and on request bargain with 1115 Nursing Home Hospital & Service Employees Union-Florida as the exclusive bargaining representative of our employees in the appropriate unit and if an agreement is reached as to wages, hours, and other terms and conditions of employment, embody the understanding in a signal written document. The appropriate unit is:

> All full-time and regular part-time housekeeping and laundry employees employed at King David Center in West Palm Beach, Florida, excluding all other employees, guards and supervisors as defined in the Act.

HEALTHCARE SERVICES GROUP, INC.

George S. Aude, Esq., for the General Counsel.
Elliot J. Mandel, Esq. (Kaufman, Naness, Schneider & Rosensweig, P.C.), of Jericho, New York, for the Employer, King David Center.
William Wolfe, of Deerfield Beach, Florida, for the Employer, Healthcare Services Group, Inc.
Howard Susskind, Esq. (Susskind & Sugarman), of Miami, Florida, for the Union. (Not Present.)

DECISION

STATEMENT OF THE CASE

ROBERT C. BATSON, Administrative Law Judge. These cases, consolidated for trial, was tried before me at West Palm Beach, Florida, on 15 trial days between February 6 and March 31, 1995, based on a third order consolidating cases, amended consolidated complaint, and notice of hearing, the operative complaint herein, issued by the Regional Director for Region 12 (Tampa, Florida) of the National Labor Relations Board (the Board). Pursuant to the National Labor Relations Act amended, 29 U.S.C. 151 et seq. (the Act). The complaint alleges that PVM I Associates, Inc., d/b/a King David Center and U.S. Management, Inc./I.I.M.S., Joint Employers (Respondent or King David), engaged in numerous acts in violation of Section 8(a)(1), (2), and (3) of the Act. The complaint further alleges that Healthcare Services Group, Inc. (Healthcare or Respondent Healthcare) committed acts in violation of Section 8(a)(1), (3), and (5) of the Act.

All charges and amended charges herein were filed by 1115 Nursing Home Hospital and Service Employees Union-Florida, (the Union or 1115). The charges in 12–CA–16380 were filed on July 15, 1994,[1] and in 12–CA–16762 on November 25, 1994, alleging conduct in violation of Section 8(a)(1), (3), and (5) by Healthcare. The charges were timely served. The remaining 10 charges allege conduct in violation of Section 8(a)(1), (2) and (3) of the Act by King David. The charge in Case 12–CA–16380–2 was filed on July 15; 12–CA–16425 was filed on August 1 and amended September 16; 12–CA–16427 was filed on August 1 and first amended August 18, a second amended charge filed on September 16 and a third amended charge on December 8; 12–CA–16454 filed on August 16 and amended on September 16; 12–CA–16523 filed on August 31; 12–CA–16786 filed on December 5 and amended on January 26, 1995; 12–CA–16809 filed on December 14 and 12–CA–16839 was filed on December 30. All charges and amended charges were timely served on King David.

[1] All dates herein are 1994 unless otherwise indicated.

The complaint alleges a plethora of unlawful conduct by supervisors and agents of King David which violate Section 8(a)(1) of the Act including surveillance and creating the impression of surveillance of its employees union activities; coercive interrogation; threats to discharge, issuing disciplinary warnings and change of work schedules as well as unspecified reprisals because of its employees' union activities and essentially every other 8(a)(1) violation ever alleged in any complaint. The complaint alleges that King David unlawfully discharged 12 employees and suspended 2 other employees for several days in violation of Section 8(a)(3) and (1). Additionally it alleges the issuance of numerous verbal and written warnings also in violation of Section 8(a)(3) and (1). The complaint also alleges that King David violated Section 8(a)(2) and (1) of the Act by allowing International Union of Industrial Service Transport and Health Employees District 6 (District 6), to come on its premises to campaign while denying that privilege to 1115.

As to Healthcare the complaint alleges that King David caused it to discharge one employee in violation of Section 8(a)(3) and (1) of the Act and in violation of Section 8(a)(5) and (1) it refused to bargain with the Union after the Union's certification as the exclusive collective-bargaining representative of its employees in an appropriate unit. Additionally Healthcare's only alleged supervisor, Tom Rathe, is alleged to have threatened employees with unspecified reprisals.

Both King David and Healthcare admit all procedural allegations of the complaint but deny that they have violated the Act as alleged therein.

I find that the General Counsel has sustained his burden of establishing by a preponderance of the credible evidence that the Respondents have violated the Act in a substantial number of the allegations and has failed to do so in others.

All parties have been afforded full opportunity to appear, introduce evidence, to call witnesses, examine and cross-examine witnesses, to introduce all relevant documentary evidence and to file posttrial briefs. Briefs were filed by the General Counsel and King David and have been carefully considered. Based upon the entire record including my observation of the demeanor of the witnesses testifying under oath.[2] I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, PVM I Associates, Inc. d/b/a King David Center (King David Center), a Florida corporation, with an office and place of business located at West Palm Beach, Florida, where it is engaged in the business of operating a skilled nursing facility (King David).

During the past 12 months, King David, in conducting this business operation derived gross revenues in excess of $250,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Florida.

At all material times, Kind David has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, U.S. Management, Inc./l.l.M.S. (U.S. Management), a New York corporation, with an office and place of business located in Brooklyn, New York, has been engaged in the business of supplying personnel to various employers, including Kind David Center.

At all material times, King David Center and U.S. Management have been parties to a contract which provides that U.S. Management is the agent for King David Center in connection with supplying King David Center with nursing department personnel at King David Center's West Palm Beach, Florida facility.

At all material times, U.S. Management has possessed control over the labor relations policies of King David Center and administered a common labor policy with King David Center for certain employees of King David Center at its West Palm Beach, Florida facility.

At all material times, U.S. Management and King David Center have been joint employers of certain employees of King David Center at its West Palm Beach, Florida facility.

At all material times, Respondent Healthcare, a Pennsylvania corporation, with an office and place of business located in Deerfield Beach, Florida, has been engaged in the business of providing laundry and housekeeping services to various nursing facilities all over the United States, including King David Center, in West Palm Beach, Florida (Respondent Healthcare's facility).

During the past 12 months, Respondent Healthcare, in conducting its business operations derived gross revenues in excess of $250,000 and purchased and received at its facility goods valued in excess of $50,000 directly from points located outside the State of Florida.

At all material times, Respondent Healthcare has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

The complaint alleges, the answer admits and I find that 1115 Nursing Home Hospital and Service Employees Union-Florida is a labor organization within the meaning of Section 2(5) of the Act.

I also find that International Union of Industrial Service transport and Health Employees, District 6 is a labor organization within the meaning of Section 2(5) of the Act.

[2] Essentially all of the General Counsel's witnesses were Haitian and spoke Creole as their native language. Most of these witnesses, with the exception of King David's, supervisor, Yves Waterman, none of the supervisory personnel spoke Creole. However when a witness was testifying with respect to statements made to them in English, I required that they testify in English to demonstrate that they could understand the language to that extent—additionally. The facts found are based on the record as a whole and my observation of the witnesses. The credibility resolutions, here, have been derived from a review of the entire testimonial record and exhibits with due regard for the logic of probability. The demeanor of the witnesses and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404 (1962). As to those witnesses testifying in contradiction to the findings here, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it was in and of itself incredulous and unworthy of belief. All testimony has been reviewed and weighed in light of the entire record. No testimony has been predetermined.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction and Background

King David Center is a skilled nursing facility located at West Palm Beach, Florida. It is operated by PVM I Associates, Inc. which holds the Florida state license to operate the facility. PVM is owned by TNS Nursing Homes, Inc., which in turn is owned by Continental Health Affiliate, Inc. U.S. Management, pursuant to a contractual commitment with PVM I, provides them with personnel, including CNAs[3] and dietary employees and PVM I is obligated to pay U.S. Management a certain fee for these employees. Both PVM I Associates, Inc. d/b/a King David Center and U.S. Management/I.I.M.S.D. were found by the Acting Regional Director for Region 12 to be a joint employer. The Board denied review of this finding. Healthcare is a corporation engaged in the business of providing housekeeping and laundry services at various Healthcare facilities, including the King David facility. Healthcare and King David Center operate pursuant to a contractual relationship which can be terminated without cause by King David Center.

In July 1993, the Union, 1115, began an organizing drive among the employees at King David and Healthcare under the direction of organizer Marie Jean Phillippe. The employee organizing committee at King David consisted of Ernest Duval, his wife, Lude, Pierre Exile, Carline Dorisco, and Michelle Williams. The committee at Healthcare appears to be Jean Damond and an employee, Solomon. It appears these committees obtained some authorization cards from other employees but it was not until December 1993 and January 1994 that union meetings were held with the employees and union lapel buttons were distributed to the employees of both King David and Healthcare which were openly worn by many employees while at work.

On January 25, 1115 filed a petition in Case 12–RC–7692 for a unit of employees at King David and on January 28 filed a petition in Case 12–RC–7695 for a unit at Healthcare. In late February the cases were consolidated for hearing to determine, inter alia, whether a single unit of King David and Healthcare employees would be appropriate or whether they constituted separate units. At this hearing a representative of District 6 appeared as a surprise intervenor and on the bases of two authorization cards and was permitted to intervene in the King David unit only.

On June 17, the Acting Regional Director for Region 12 issued his Decision and Direction of Election finding separate units to be appropriate. The unit at King David is:

> All full-time and regular part-time nursing department CNAs and dietary employees employed by PVM I Associates, Inc., d/b/a King David Center and U.S. Management/I.I.M.S., Joint Employers, at the King David Center located in West Palm Beach, Florida; excluding all other employees, including LPN's, RNs, care plan CNAs, medical records CNAs, ward clerks, central supply aides, dietary technicians, maintenance employees, activities aides, restorative therapy aides, respiratory therapists, nursing administrative secretaries, receptionists, admissions clerks, physical therapy aides, physical therapy assistants, guards and supervisors as defined in the Act.

The unit found appropriate at Healthcare is:

> All full-time and regular part-time housekeeping and laundry employees employed by Healthcare Services Group, Inc., at the King David Center located in West Palm Beach, Florida; excluding all other employees, guards and supervisors as defined in the Act.

An election was conducted on August 5, in both units and 1115 received a majority of votes cast in both units. Objection to the election at King David were filed by the Employer and District 6.[4]

Objections to the election was also filed by Healthcare but were dismissed by the Regional Director and on September 12, and 1115 was certified in the above described unit.

The General Counsel argues that from the time Respondent learned of its employees interest in the Union, which he suggests was almost immediately, i.e., in July 1993, it entered upon a course of harassment and discrimination designed to dissuade its employees from obtaining union representation. This, the General Counsel asserts, Respondent achieved by more closely scrutinizing employees work; issuing counselings or warnings to its employees for alleged deficiencies in their work performance for things it had not previously done and implementing schedule changes and other methods of harassment.

The Respondent contends that any changes in its scheduling or other work rules it may have made were necessitated solely by business and efficiency and was not motivated by the union activity of its employees. It further argues that the discharges; suspensions and other adverse actions taken against any employee would have been taken without any union activities and thus under the *Wright Line*[5] doctrine it has established by a preponderance of evidence that even if the General Counsel made a prima facie case that it has met its burden of showing that the same action would have been taken absent union activity.

In its opening statement at trial and in its posttrial brief Respondent strenuously argues that due to the language barrier between supervision and the employees most of witnesses presented by the General Counsel should not be credited. As noted elsewhere, the testimony was that 95 percent of the unit employees were Haitian and Creole was their native language. Some spoke and understood the English language to a very limited extent. Yves Waterman was the only Haitian supervisor and could speak and understand Creole fluently and English extremely well. None of the other supervisors including Director of Nursing Betty Whelan and Quality Assurance Control Nurse Lisa Megill, the two principle supervisors here involved, spoke or understood Creole, and apparently made no effort to learn. It is apparent, however, that the supervisors and employees communicated well enough to operate the business.

In this regard the Respondent used the example of the possibility that an employee who was told they could be replaced in the event of a strike might construe the word "replaced" as "fired."

[3] Certified nursing assistants.

[4] These objections were consolidated for hearing with the unfair labor practices herein. In order to expedite the question concerning representation raised by the objections, on July 26, 1995, I issued an order severing the objections from the unfair labor practices case and on August 3, 1995, issued my decision recommending that the Union be certified. On November 1, 1995, the Board adopted my decision and issued a certification of representation in the unit described above.

[5] *Wright Line*, 251 NLRB 1083 (1980).

It is granted the language barrier makes this case somewhat more difficult. However, I find that most of the employees understood enough of the English language to convey truthfully what was said to them.

The Respondent issued to each of its employees a detailed "Employee Handbook" upon their commencing work at King David. (G.C. Exh 10.) This pamphlet set forth in very direct language all elements of employee conduct and patient care. It also detailed employee classification and responsibilities as well as its absentee policies and "call in" rules. It further spelled out disciplinary procedures and causes for discharge or other discipline.

From the totality of the record testimony of both the General Counsel's and Respondents' witnesses it is abundantly clear that prior to the onset of union activity the strict provisions of these rules were seldom enforced and it appears that management and the employees viewed the handbook more as a loose guideline for employees activities and conduct and not a strict, no exceptions document. It is also evident that management made many exceptions to the rules set forth here by permitting employees exceptional absences without reprimand or discipline as well as accommodating employees by making special shift arrangements for some reasons and permitting them to vary their shift and hours. Such instances will be demonstrated below in discussions of the facts of many of the employees discharges. In other words management worked with employees to accommodate their individual needs i.e., attending school, giving weekends off to attend church activities and other reasons.

However, as is frequently the case, upon the advent of serious union activity the Respondent dusted off its handbook and began to utilize it to harass and discriminate against its employee who supported the Union. I believe these observations will be amply demonstrated in the discussions below.

B. Refusal to Bargain by Healthcare

I shall address this allegation first inasmuch or there is no material dispute as to the facts. This issue arises from the complaint in Case 12–CA–16762 alleging that since about November 10, 1115 requested Healthcare to meet and bargain with it as the certified collective-bargaining representative of an appropriate unit of employees and that since that date Healthcare failed and refused to do so unless and until the representation question of certain unit of employees of King David, not included in the unit, was resolved, asserting that it was futile to engage in collective bargaining at that time.

After the Unions certification in the above-described Healthcare unit on September 12, either the Unions' attorney, at that time Alan Elster, or its Regional Director Enrique Santiago, requested Respondent to meet with it and bargain. The record is unclear as to how on October 24, a meeting was arranged. Nevertheless on October 24, at about 9 a.m. Healthcare's Regional Manager, William Wolfe, and its marketing manager, Ralph McClurg, met with Santiago and 1115 Business Representative Maury Tanenbaum for negotiations. Wolfe is the only witness testifying with respect to this one meeting. The Union did not submit a proposal but Tanenbaum quoted wage rates he wanted and vacations and holiday pay. Wolfe observed that he thought that was way out of line. Tanenbaum asked Wolfe if he was ready to sign a contract. Wolfe said he was not and that he was inexperienced in negotiations and asked that the Union send a written proposal. The meeting lasted about 1 hour.

On October 31, the Union sent its written proposal to Wolfe asking for future negotiating dates. Wolfe testified that he did not respond because the written contract contained the same figure as those discussed at the meeting.

On November 10, Alan Elster, attorney for the Union, telephoned Wolfe regarding dates for negotiations. It is not denied that Wolfe told Elster that Healthcare could not enter into a contract with the Union until the other unit, referring to the King David unit, had been certified.[6] Wolfe told Elster that King David would find some reason to terminate Healthcare if they became union.[7] As noted above the results of the election in the King David unit, which the Union won, was pending resolution of objections to the election. Wolfe refered Elster to the president of Healthcare, Dan McCartney. Elster contacted McCartney who told him that Healthcare could not give the Union a contract at King David while the other unit was undecided because if they did so King David would terminate their contract. Neither Wolfe nor McCartney would give Elster dates on which it would meet and they did not thereafter contact him. Finally 1115 Florida Director Santiago directed Elster to file charges against King David alleging their refusal to bargain. This Elster did and the charge in Case 12–CA–16762 was docketed on November 25.

On receipt of the charge by Wolfe, he called Dan McCartney and did nothing else. About January 19, 1995, the investigating agent for Region 12 sent Wolfe a letter advising that he was investigating the case and asked for his cooperation. Thereafter, on January 23, Wolfe wrote a letter to Region 12 Regional Director with a copy to Elster, stating that Healthcare would bargain with the Union and gave several dates. Elster, who at that time no longer represented the Union, testified that he merely placed the letter in a file and did not forward it to 1115. Wolfe testified that he was never asked to give a statement to the Board, but thereafter a complaint issued. Wolfe made no attempt to contact Santiago or Tannenbaum who had been the union representatives at the single meetings the parties had.

Analysis and findings

It is evident on the undisputed facts here that Healthcare had no intention of entering into a collective-bargaining agreement with the Union as long as the election in the King David unit was unresolved. Regardless of the reason an employer might have for refusing to bargain with the duly certified representative of its employees, here the fear of losing their contract with King David, it is well settled that such refusal violates Section 8(a)(5) and (1) of the Act. Moreover, in this case even had Respondent met with the Union for negotiations it could not have bargained in good faith as long as it had no intention of executing a contract.

The Respondent did not cure the violation by agreeing to meet after refusing to do so for more than 2 months and only after unfair labor practice charges were filed against it. In *SKS Die Casting*, 294 NLRB 372 (1989), the Board held the Employers refusal to negotiate violated Section 8(a)(5) and (1) not withstanding that the refusal lasted only 9 days and the Em-

[6] At the representation hearing Healthcare had taken the position that Healthcare's laundry and housekeeping employees should be in the same unit with the King David employees, insisting that was the only appropriate unit.

[7] The contract could be terminated without cause on 30 days notice.

ployers offer to bargain was in response to unfair labor practice charges.

Accordingly, Respondent Healthcare violated Section 8(a)(5) and (1) of the Act.

C. King David

With the numerous 8(a)(1) and (3) allegations including alleged discrimanatorily issued warnings or counselings to its employees it is difficult to assimilate and organize this decision. Some of the 8(a)(1) allegations and 8(a)(3) discriminatory actions against its employees will be discussed separately while others will be dealt with in an analysis of the discharges.

1. Surveillance

The complaint alleges that in mid-July Respondent by Quality Assurance Director Lisa Megill and Nurse Supervisor Celina Caprisecco engaged in surveillance of employee' union activity. Marie Jean Philippe testified that she and Enrique Santiago and another union representative, Courtney Richards, had scheduled a meeting with some of the employees at the Pizza Hut located about a mile, or a 5-minute drive, from the facility. Phillippe stated that she arrived about 1:30 p.m. and joined the other two representatives and employee Michelle Williams. Phillippe recognized Megill and Caprisecco as supervisors from the facility and Williams identified them by name. Megill and Caprisecco were seated about 5 feet away and remained there until about 2:55 p.m. when they left. Other employees later came in. It is admitted that the meeting was not publicized. According to Phillippe, at one point Megill made a statement to Caprisecco about the Haitian boat people in a voice intended to be loud enough for them to hear. Phillippe made a statement to Richards in an equally loud voice to the effect that they were boat people and that was why the Union was going to get in.

According to Phillippe, Megill and Caprisecco did not order food but sat there drinking something from cups and smoking cigarettes for almost an hour and half. She stated they were not served any food not did they take any with them.

Megill and Caprisecco testified that they seldom left the facility for lunch, Megill's stating that she would probably not go out for lunch more than once a month. They admit going to the Pizza Hut after considering going to a McDonald's which was nearby, arriving about "onish." They also admit to seeing the union representatives and Williams and being seated close to them. They state they were there about an hour and the server had forgotten to turn in their orders. It is unclear whether they were ever served food. They, of course, deny making a statement about Haitian boat people and inasmuch as it is not alleged as a separate violation I need not make a credibility determination.

The Respondent argues that the union meeting was not widely known and its supervisors did not know of it and merely went to lunch at one of the restaurants closest to the facility. Megill, as quality assurance director, was apparently second only to Director of Nursing Betty Whelan, her mother, in authority over the nursing department. Both Megill and Capriccio were on duty.

The record reveals that Phillippe met with King David employees frequently at the Pizza Hut, particularly the organizing committee, at times usually coinciding with the 3 p.m. shift change. I think it highly probable, but do not need to find, that the supervisors had been made aware of this. I credit Phillippe, whose testimony in this respect is not denied, that Megill and Caprisecco were there when she arrived at 1:30 p.m. and they remained until 2:55 p.m. Assuming that the supervisors were not aware, prior to their arrival that the union representative were meeting with the employees at that time, they became aware of it at the time Phillippe arrived. Megill testified that she recognized her as one of the union people who were frequently around the facility, especially at shift change. I am convinced that Megill and Caprisecco prolonged their stay at the Pizza Hut to observe the meeting and the employees in attendance there.

Accordingly a preponderance of the evidence persuades me that they were engaged in surveillance of the employees union activities.

2. The no Creole rule

In May, the Respondent instituted a rule prohibiting employees from speaking to each other in Creole at any place in the facility except the break areas. The employees were advised of this rule by the posting of the following notice.

ATTENTION NURSING STAFF

> It is the Policy of King David Center that employees will not speak in any other language than English in the presence of residents or family members. It is considered verbal abuse. Please see page 3 of our State Survey. It is permitted to speak your native language in break areas.

Respondent contends that it had an "in service"[8] with its employees when this rule was implemented. It also had at least some employees sign a paper containing the rule indicating that they had read it. (R. Exh. 12.)[9]

The Respondent asserts this rule was implemented following an inspection by the Florida Department of Health, Health Care Financing Administration. Betty Whelan testified that the inspectors heard the employees conversing in Creole with each other in the dining room while the residents were having a meal. She testified that the inspectors deemed this to violate the residents dignity and labeled it "verbal abuse." The facility was given a deficiency for this and was forced to take steps to correct it. (R. Exh. 59, 3.)

The General Counsel argues that although Respondent may have been compelled to take some action in this respect the rule promulgated was far too broad in that it prohibited the speaking of Creole in the facility to only break areas and that Respondent created the rule as a vehicle by which it could limit the employees ability to engage in union activity. Its clear that management considered the union organizing activity to be Haitian business.

Although this rule was promulgated in May it does not appear that anyone received a writeup until around the week of the August 5 election at which time some known union adherents were given written warnings all of whom are alleged 8(a)(3) discriminatees here. Ernest Duval, the most active union supporter was given a written warning although he testified he was not speaking Creole but merely waived to a Haitian housekeeping employee. Quettelie Jean-Baptiste received a writeup for speaking Creole in the kitchen while she was on break and the nearest patient was outside the kitchen in the

[8] An "in service" is when a supervisor calls employees together and explains a change in any procedure.

[9] The record does not reflect just where in the facility break areas are located, or that there is any particular location.

lobby watching television. Caty Joseph received a writeup for violation of the rule for speaking Creole near the nursing station when no residents were present. Whelan stated that except for the break area one never knew when a resident or patient would walk in.

According to Betty Whelan about 95 percent of the CNAs were Haitian and judging from some who were called as witnesses many had very little ability to converse in English. The CNAs were the primary care givers to the residents none of whom spoke Creole. I find it difficult to understand how it would be more verbally abusive to the residents for the employees to converse with each other in Creole than for the residents to not be able to communicate with their primary care givers. However, that is not my judgment to make.

With respect to this rule, I find it interesting that Respondents counsel asked Whelan whether she had asked the inspecting authorities to cite the facility for this in order to implement a rule that would certainly impair the employees union activities. She, of course, replied in the negative.

I find the rule as written to be overly broad in that it permits employees to converse in Creole only in break areas. It might have been written so that the employees could converse in Creole in any nonpatient area.

I find that the rule was disparately enforced against known union adherents and they received disciplinary warnings because of this union activity.

The remaining 8(a)(1) allegations might better be disposed of a discussion of the alleged 8(a)(3) discriminatees. I shall consider these in the order in which there were discharged.

1. Jean Aliza, February 25

Jean Aliza, a CNA, worked the 7 a.m.–3 p.m. shift on the first floor under the direct supervision of Celina Capresecco and was discharged on February 25, making him the first of the 12 alleged discrimanitees to be terminated. Aliza had worked at King David from 1987 to some time in 1990 when he was injured and had to quit. He was rehired April 14, 1993. His termination occurred about the time of the hearing in the underlying representation case.

Aliza testified that his union activity consisted of signing an 1115 authorization card (G.C. Exh. 34), wearing an 1115 lapel pin on his shirt or jacket while at work (G.C. Exh. 13) and he attended at least two union meetings. He started wearing the union pin in early January. He testified that about the first day he wore the union pin Celina Caprisecco came into room 115 while he was bathing a patient and after making an inquiry about the patient pointed a finger at the union pin and "asked me what is this?" He replied that it was a button whereupon she pulled closer to him and he told her to read it. He stated that Celina asked, "What the Union?" She then looked at him as if she were mad and walked away.

Aliza testified that prior to this time he had a good relationship with both Capreseco and Megill and when inspecting his work they would sometimes say "great." After that day their attitude changed and they talked to him as if they didn't like him and would admonish him for things he had not done and place blame on him for patients for whom he was not responsible. He stated that prior to this time Celina and Lisa made rounds twice a shift but after this they started making rounds every 2 hours. He stated that prior to this they normally stood at the door and looked the room over to see if everything was okay, but after this they came into the room and checked everything, the closets, patients drawers, and more closely inspected the bed and other things. This closer scrutiny of employees work because of their union activity is alleged in the complaint and is corroborated by several other employees.

On February 24, the day before Aliza was terminated he was doing morning care on a patient in room 121, which means bathing, making the bed, passing food trays, etc. when Celina and Lisa came in and checked everything they told him they found a piece of bread and part of a banana in the patient's drawer. They said nothing at that time but as he was passing food trays around noon he was called to the office. Lisa and Celina were in the office and Lisa told Aliza that she had found enough to fire him because the patient's drawer was not clean enough. Aliza stated that it was early and he would have time to clean it. Aliza was asked to step outside and a couple of minutes later he was called back in and Lisa told him since it was early they would give him a chance to clean the drawer. According to Aliza he said thank you and went back and cleaned the drawer. At shift's end, 3 p.m. he clocked out and went home.

When he returned for work at 7 a.m. on the February 25 and while awaiting an assignment from the charge nurse, Celina asked him to come into the office where she told him to clock out because he had been fired the day before. He told Celina he would not clock out since she was the one who fired him she could clock him out. She advised him that if he desired he could wait and talk to the director of nurses, Betty Whelan.

Aliza waited until about 9 a.m. when Whelan and her daughter, Lisa Megill, arrived. He followed them into the office and Whelan asked what he wanted and he told her that Celina had told him to clock out he was fired. Whelan told him that he had been nasty to Celina and even to her. She told him he had been rude to Celina when Celina asked him about the union button and that he never stopped to say good morning to her. Whelan then told him his supervisor had fired him and there was nothing she could do for him.

Aliza testified that during his first tenure of employment 1987 to 1990, when he was compelled to quit due to an injury, he had received two warnings or counseling forms for his work performance. The Respondent proffered five such writeups (R. Exh. 37, a-e) which were rejected by me as being remote and having no bearing upon his last term of employment, 3 years later. Aliza also testified that prior to the February 24 incident for which he was terminated he had not received any warnings for his work performance or anything else. Based upon the testimony of Capresesco, Megill, and Whelan and Respondent's argument in brief, Aliza's work performance and conduct was satisfactory until February, when it suddenly became extremely unsatisfactory. As noted, Aliza began wearing his union pin in January and was questioned about it by Celina. Respondent elicited testimony from Celina and Lisa that on February 9, he received a warning for unsatisfactory work quality and was counseled concerning patient care. (R. Exh. 38.)

The Respondent elicited testimony from Celina that 2 days later, on February 11, Aliza became rude and abusive to her when another CNA was transferred to another floor necessitating the remaining CNAs to carry an increased work load for that shift. It's asserted that the charge nurse determined the division of work to be fair and Aliza received a warning for his rudeness and vocal outburst. (R. Exh. 39.) It is further asserted that on February 23, Aliza refused instruction to assist another CNA, Y. Domand, to move a patient, and received a counseling for this from the charge nurse.

Capresecco testified that when she reviewed Aliza's work assignments on February 24 and found them to be lacking Aliza became hostile and insubordinate for which he also received a warning (R. Exh. 40.)

Aliza denied being shown any of these warnings or being otherwise aware of them prior to his termination. None of the warnings were signed by Aliza indicating that they had been shown to him. Employees were not required to sign such written warning.

Essentially all the employees testifying against whom adverse action had been taken were shown written warnings which they denied ever having seen. I credit Aliza in his denial of being aware of any of written warnings Respondent allegedly had given. I also credit him that Celina interrogated him with respect to the union pin he wore on his uniform and perhaps viewed Aliza's response to her as rude since he refused to tell her what it was but told her to "read it."

Although the complaint alleges that Respondent began scrutinizing its employees work more closely in July, I find, based on Aliza's testimony that such closer scrutiny commenced much earlier, about the time the petition was filed. In short, I find that Respondent discharged Aliza because of his open support for the Union in order to discourage union activity. By Respondent's own contention, until the time Aliza made his union sentiments known his work had been, at least, satisfactory for almost a year and suddenly it became unsatisfactory. In my view once Aliza let his support for the Union become known I believe he would have striven harder to avoid doing something to give the Respondent a reason to fire him. In other words he was set up by Lisa and Celina.

Accordingly, his discharge violates Section 8(a)(3) and (1) of the Act.[10]

2. Lude Duval-April 21

Lude Duval worked for King David in the capacity of a CNA from April 4, 1992, to April 21, 1994, when she was terminated by Respondent allegedly because she did not have a CNA license or certificate from the State of Florida. Lude is the wife of Ernest Duval the leading and most vocal employee union supporter. Among other things he was the employee representative for the Union at the representation case hearing held approximately February 22 and March 13 and 14. He also made radio appearances with union organizer Marie Jean Philippe on a couple of Creole-speaking radio station urging King David employees to support the Union.

Lude Duval signed an authorization card for 1115 in July 1993 and commenced wearing the 1115 union pin on her uniform in January when the representation petition was filed at all times she was at work. (G.C. Exh. 13.) The Respondent does not deny that it knew L. Duval was a strong union supporter. Duval initially worked the 11 p.m. to 7 a.m. shift 5 days a week. After about 6 months she requested Megill to let her work two double shifts and one single shift a week because of her small children. The request was granted and she worked those shifts as a floater.

On the first day of the hearing in Case 12–RC–7692 at which her husband appeared with the Union, when she reported to work at 3 p.m. supervisor, Yves Waterman, greeted her near the nursing station and said, "I hear your husband was going to Court with Mrs. Betty, what was going on?" Duval replied that she didn't know and he would have to ask Whelan. Waterman then looked at her union pin and said, "Mrs. Duval, you can be in trouble." Although Waterman was the only supervisor who spoke fluently both Creole and English, these comments were made in English.

About March 16, the day after the conclusion of the ''R'' case hearing which her husband had attended on behalf of the Union, Lisa Megill approached her as she was drinking a glass of water near the nursing station and addressed her in an angry manner which she had never done before. According to Respondent L. Duval received a "write-up" for this alleged serious offense. Subsequently, perhaps later that day, Megill telephoned Duval at home and told her that her schedule had been changed, apparently meaning that she would have to work five single shifts a week. In the same conversation Megill inquired for the first time in Duval's 2-year employment as to whether she had a CNA certificate.[11] Duval replied, "No." but she would bring papers to show that she was in the process of taking the RN or LPN test. Megill told her to bring the paperwork in proving that she was taking the RN test, but admonished her not to bring her husband because he gave her too much trouble. Prior to this time nothing had ever been said about Duval's husband, Ernest, causing trouble.

L. Duval was scheduled to work the 11 p.m. to 7 a.m. shift. When she arrived she found her timecard gone from the rack. She inquired of Waterman, the 3 to 11 p.m. supervisor about the card and was told Megill had told him to remove it. Waterman telephoned Megill and Duval talked with her. Megill told her that it was against the law for her to work without a CNA certificate and added that Duval and her husband was giving her too much trouble. Duval said, "Mrs. Lisa, after 2 years you just realized I don't have any certificate as CNA. Why you hire me . . . why you hire me after 2 years you just realize that, and then when I spoke to you at 3:30 on Thursday, why you—I was scheduled to work, why you don't tell me don't go to work until I show you the paper?" As a result of this call Duval was permitted to work that shift on condition that she bring paperwork showing that she was taking the LPN and/or RN tests. She did so on Friday and showed them to Whelan and Megill. They made copies and permitted Duval to continue to work.

On the following Saturday someone punched Duval's timecard when she was not there. Megill confronted her with this and Duval credibly denied that she had done it since she was not there. Megill again told her that she and her husband were giving her too much trouble.

Lisa Megill inquired several times of Duval as to whether she had gotten the results of her RN test. Finally, on April 20, Duval told Megill that she had not passed her RN test. Megill allegedly called Tallahassee, Florida, and claims she was told that Duval could no longer work as a CNA and she was forthwith terminated. The Respondent admits that Duval was one of

[10] A brief comment concerning credibility of particularly Whalen and Megill. Both seriously impaired their credibility by testifying that they had no interest in the union activity or whether or not the employees selected the Union to represent them. For instance Whalen testified that when she first observed the union handbilling employees at the entrance to the facility she had no feeling one way or the other. She testified that "I couldn't have cared less." Megill also testified that it didn't make any difference to her what the employees did with respect to the Union. These are clearly misstatements in view of their subsequent discrimination against union adherents.

[11] Duval's qualification for the position of CNA will be set forth below.

its best CNAs and had never received a warning or counseling for her work performance.

When Duval was hired Lisa Megill gave her a test which Megill testified she had devised and gave to most CNAs, although the test was not a substitute for the State CNA exam.

The Respondent contends that it underwent a review by the U.S. Department of Health and Human services in which certain deficiencies were noted in its personnel records. As a result it conducted a full audit of all its personnel records and for the first time discovered that Duval did not have her CNA license. Duval has a 3-year college degree leading to her RN degree from a college in Belgium. She had worked with her RN degree 1 year in Belgium and 5 years in a hospital in New York under a special license prior to going to work at King David. During the audit of its personnel files in which it discovered Duval lacked a CNA certificate it missed the fact that CNA Joyce Neloms also did not have such a license. However, when it came to Respondents' attention that Neloms did not have a certificate it claims that it removed her from direct nursing care but employed her in another capacity until she obtained the certificate. In June, Duval received her CNA certificate and 1115's attorney, Alan Elster, sent a copy to Respondent and requested immediate reinstatement of Duval. It should be noted that 8(a)(3) and (1) charges had been filed on Duval's behalf at this time. Duval was never called back to work or offered reinstatement.

It is abundantly clear that, if a CNA certificate is a prerequisite to work in that position, Respondent was, to say the least, extremely careless and remiss in assuming that all such employees had a state certificate. If such were a requirement, why did Lisa Megill devise her own test, which according to her she gave to most, if not all, applicants for the position of CNA?

Duval had been employed by Respondent for 2 years and admittedly her work record was spotless. It was not until after she and her husband demonstrated their strong support for the Union, 1115, that any question concerning her lack of a Florida CNA certification was raised. Undoubtedly both Director of Nursing Betty Whelan and Quality Assurance Nurse Lisa Megill were aware of Duval's credentials, albeit she did not have and never had, a Florida CNA certificate. I find it inconceivable that for more than 2 years Respondent was unaware that Duval lacked this critical certificate. It is noted that it was not the Department of Health and Human Services who found certain unspecified deficiencies with the Employers' personnel records who discovered Duval's lack of a certificate, but Respondent's asserted full audit of all its personnel files.

I have no doubt that Respondent seized on this fact to terminate Duval for the union activities of her and her husband. From the overall record it is evident that Respondent could have, as it did with Nelom's who was antiunion and testified for Respondent at trial given her a nondirect nursing position until she obtained her CNA. Accordingly, I find that Duval's discharge violates Section 8(a)(3) and (1) of the Act. I further find Yves Waterman's questioning Duval about her husband's participation in the representation case hearing is unlawful interrogation and his comment to her that she could get in trouble for wearing the 1115 union prior constitute a threat of unspecified reprisals.

3. Marie Larose—May 31

Larose worked as a CNA at King David from April 26, 1993, to May 31, 1994, at which time she was terminated by Lisa Megill who had left Larose's name off the work schedule and told her they did not need her or any Haitian to work there. Larose worked the 11 p.m. to 7 a.m. shift for several months at which time she was transferred to the 3 to 11 p.m. shift under the supervision of Gretza Matses. She testified that she signed an 1115 card in late January or February and at that time started wearing the 1115 union pin on the left chest portion of her uniform while she was at work. (G.C. Exh. 13.)[12]

Larose testified that shortly after she started wearing the union pin Megill talked with her twice about it. Once in a hallway when she told her to take the pin off and the second time in the office when she told her to take it off or she would be fired. Larose's pretrial affidavit mentioned only one such incident. In any event I credit her that Megill told her to take the pin off or she would be fired.

A short time later Megill told her that she had no full-time work for her and reduced her from 5 days a week to 3 days a week. Megill told her there was no more full-time work. Larose testified that she liked her job and had bills to pay but she would not take the pin off because Duval had told her to wear it at all times she was at work.

On May 21, her name was not on the schedule. She told Megill she did not see her name on the schedule and asked why. Megill replied they did not need her any more and when Larose asked why, Megill repeated that they did not need her that she was fired. Larose again asked why and stated, "There are no job for working Haitian here." Larose thereupon left the premises.

The Respondent argues that her termination was for an incident that occurred in December 1993, for which Larose received a written counseling and apparently a 3-day suspension. The December 4, incident involved a resident or patient in room 229. Larose testified that the gentleman in room 229 was so large and heavy that it required two people to turn him. At that time there were three instead of four CNAs on that station. The patient needed to be turned and, not being able to find anyone to assist her, Lerose asked the patient to assist in turning by pulling on their side bars so that she could clean him. The net result is the side bars did not stay in position and the patient fell to the floor. Larose immediately called her supervisor, Gretza Matses. The two of them could not lift the patient back onto the bed and Matses summoned two other CNAs. The four of them managed to get the man onto a sheet and lifted him back on the bed. Larose stated that he had a scratch on his head. Matses took his vital signs and told Larose she wanted to talk with her downstairs after work. At that time Larose told Matses that it was an accident in that she did not know the side bars were "not in working order." Matses told her to make sure it did not happen again, that it was an accident. Larose went home. She was not assigned to that patient again. The patient died about a week later. However, there is no testimony that the fall contributed to his death but, it was at that time that Larose was suspended for 3 days.

The Respondent argues that Larose was discharged as a result of the December 4 incident. Megill testified that she determined at that time to phase out Larose's employment. Both Director of Nursing Whelan and Quality Assurance Nurse Megill testified repeatedly that patient neglect or abuse warranted

[12] The General Counsel was unable to produce the union card Larose testified that she signed. It should be noted that the petition in the Representation Case was filed on January 24 and it is entirely likely that Larose signed her card after the petition was filed and it would not have been submitted to the Region in the union's showing of interest.

immediate termination. It is not clear what Larose's exercise of poor judgment in the December incident of the patients falling out of bed was considered, however, she received a counseling and a 3-day suspension at that time and was justified in assuming that was the extent of the discipline she would receive for her lapse of judgment in that incident.

Respondent's argument that Larose's version of the discharge meeting is filled with contradictions and is not borne out by the record. Her statement that Megill told her there was no work for her and that there was no work for any Haitians is not inconsistent or contradictory and the fact that the Union was not mentioned in the discharge conversation is not surprising as in similar situations it usually is not.

Additionally, Larose's testimony was not garbled as contended by Respondent. However, her poor comprehension of English and the necessity for an interpreter for most of her testimony, particularly on cross-examination forms no basis for discrediting her.

In December 1993, when Larose was given only a 3-day suspension for that incident Respondent was not aware of her union activity. I find the General Counsel has established a prima facie case that antiunion animus was the primary reason for Larose's discharge and Respondent has not met his *Wright Line*[13] burden of establishing that it would have taken the same action absent her union activity.

4. Suspension of Quettelie Jean-Baptiste—August 15

Jean-Baptiste worked at King David as a CNA from March 12, 1992 to August 15, 1994, when she was given a 1-week suspension at which time she returned to work and was working at the time of this hearing. At relevant times herein she worked the 3 to 11 p.m. shift under the supervision of Yves Waterman. As noted above Waterman was the only supervisor at Respondent who fluently spoke both Creole and English. Jean-Baptiste signed an authorization card for 1115 on July 12, 1993 (G.C. Exh. 17), and began wearing the 1115 union pin (G.C. Exh. 13) about a month before the August 5 election. Shortly after the election Jean-Baptiste was transferred from PVMI where she had worked for 2-1/2 years to the Medical Acute Care Wing. Around August 14, Jean-Baptiste had what was apparently an anxiety attack while at work. The paramedics were called but did not take her to the hospital. Subsequently her husband, Emmanuel Jasney, took her to the hospital where she was examined and released. Director of Nursing Betty Whelan refused to let her return to work until she obtained a doctor's certification that she was able to work. Whelan testified that this was standard procedure.

The General Counsel alleges several instances of interrogation and threats by Waterman to Jean-Baptiste. Jean-Baptiste testified that about a month before the election as she was walking down the hall to go on break Waterman stopped her and asked her who gave her the pin. She replied that the Union did and he asked why she put it on and she said because she wanted to. He then asked what the Union was going to do for her. She did not reply, but continued on her way. Jean-Baptiste testified that Waterman made these statements in Creole, but that she responded in English. She testified that again about 2 weeks before the election Waterman approached her in the hallway and in Creole told her before she voted for the Union that the Union would do nothing for them. Waterman continued that Lisa Megill had a list of names and knew who would be voting for the Union continuing that those who did not vote for the Union would be covered, but those who voted for the Union would get in trouble, "They will be fired." I find these statements to constitute an impression of surveillance and threat to discharge.

She testified further that about a week before the election as she and another CNA, Alice Decime, were leaving work at 11 p.m., Waterman told them he was going to "write them up" and give them a 3-day suspension for not responding to a patient's light on the first floor. They told him they did not see the light. The following day, Jean-Baptiste appealed to Megill who told her that since she didn't see the light she would rip the warning up and she wouldn't have to sign it.

On the day of the election, after the votes were counted, Waterman commented to Jean-Baptiste "Now you are happy because the Union won," Jean-Baptiste responded "why not."

On August 10, Jean-Baptiste was taking her break with fellow employee Caty Joseph. They were in the small kitchen warming their food in the microwave and conversing in Creole. Yves Waterman passed by and overhearing their conversing in Creole, asked if they were on break. Jean-Baptiste stated that they were. The following day when Jean-Baptiste clocked in, Lisa Megill told her she needed to see her in the office. When she arrived there Megill showed her a warning form that Waterman had prepared for speaking Creole in the kitchen. Megill asked Jean-Baptiste to sign the form and Jean-Baptiste refused, insisting that she was on break when they could speak Creole. Megill told her she didn't care but if she was written up again she would be fired.

On the same day, a Sunday, that Jean-Baptiste refused to sign the warning for speaking Creole, Megill changed her work assignment from PVMI where she had worked for 2-1/2 years to an acute care section where Jean-Baptiste was not familiar with the patients. Jean-Baptiste testified, as did a number of other employees, that after the Union petitioned for an election and particularly after the election which the Union won, the supervisors commenced making more frequent and through inspections of the CNA work and was far more critical of them. Jean-Baptiste stated that she was already upset about the unjustified "write up" and developed a "bad headache." Megill, Whelan, and Caprisecco came by about 5 minutes after she finished a patient. She testified that she could not breathe and was hyperventilating.

Much testimony was adduced with respect to what occurred when Jean-Baptiste had her "anxiety" attack on August 14. As noted she testified and it is verified by Respondent's witnesses, that she was hyperventilating and fell to the floor and was rolling around. The paramedics were called and someone telephoned her husband, Emmanuel Jasney, who came to the facility to be with his wife. There is a dispute as to Jasney's conduct when he arrived there. Whelan and others testified he was loud, yelling and demanding that something be done for his wife and that there was a confrontation at Whelan's office. The police were called and responded. It appears they were called to have Jasney removed from the facility, however, he was not arrested.

Jasney testified that he tried to get the paramedics to take his wife to the hospital but they would not, allegedly because Respondent's representatives would not let them. Be that as it may, Jasney took his wife to the hospital where she was apparently seen by a physician and released.

[13] *Wright Line*, 251 NLRB 1083 (1980).

As noted above, Whelan required that she obtain a physician statement regarding her physical and mental health before returning to work which Whelan testified was the usual procedure. She did so in 7 days.

The General Counsel argues that Jean-Baptiste's condition was precipitated by Respondent's unfair labor practices of imposing more onerous working conditions and the issuance of written warnings which were unwarranted to Jean-Baptiste, the last one stating that she would be fired if she received another one, and thus her loss of 7 days work should be construed as a unlawful constructive suspension. He contends that the suspension flowed directly from the Employer's unlawful actions.

The Respondent contends that it followed procedure after such an episode in requiring Jean-Baptiste to be certified to be mentally and physically able to perform her duties. The Respondent erroneously asserts that Jean-Baptiste and her husband refused emergency medical treatment. The evidence is to the contrary. Jean-Baptiste's husband, Jasney, pleaded with the paramedics to take his wife to the hospital, but there is no evidence that any proffered treatment was refused.

On balance, I find that the imposition of more onerous working conditions and the issuance of unjustified written warnings with a threat to discharge because of Jean-Baptiste's union activities brought about the attack and thus her suspension was an unlawfull constructive suspension.

5. Ernest Duval—August 17

As noted above, Ernest Duval was, without a doubt, the leading employee union advocate and that fact was well known to the Respondent almost from the beginning. Duval was the first, or among the first, employee to contact or he contacted by 1115. This occurred about July 1993. He and several other employees signed union cards at that time and there were a number of small union meetings arranged by Duval. However, it was not until approximately December 1993, that the Union began handbilling employees at the entrance to the facility at which time Duval was prominently and openly involved. Duval personally obtained signed union cards from a number of employees and gave cards to others for distribution. He also distributed the union lapel pins to employees which they did not begin to wear until early January and some not until after the representation case petition was filed on January 24. A week or so before the election he joined union organizer Marie Jean Phillippe in a number of radio appeals to King David employees over Creole speaking radio stations.

Duval was employed by Respondent as a CNA from March 1992 to August 17, 1994, when he was terminated after receiving at least six written reprimands by various supervisors and allegedly threatening a female supervisor on which occasion the police were called.

That Duval was an excellent CNA, at least until about July 1994, is essentially admitted by the Respondent.

In fact at one point in 1993 when Lisa Megill left King David for a job at another facility, Hill Haven, she persuaded Duval to come to work for her there. It appears Duval worked only part-time there because he remained a full-time employee at King David.

Prior to July 1994, Duval had received one written counseling in February 1993. This concerned a patient whose nails he had not cleaned or washed. He admitted this, but testified that the patient was fighting and he could not hold her still to cut the nails. Respondent contended that there was more than one patient involved in this counseling. Be that as it may, Respondent concedes that Duval was a very good CNA until about July 1994 when he suddenly did an about face.

Duval commenced wearing his union pin about January 24, when the Representation case petition was filed. He testified that the first week in February while he was making a bed in room 232 Lisa Megill came up to him and touched the pin and asked him to tell her what it meant. She told him she did read it but didn't understand it. He told her it was for the Union. She said, "You too," and appeared to be surprised. According to Duval, Megill immediately went next door to room 230 where she asked Betty Augustine another CNA the same question about her pin and Augustine told her it was a union pin for 1115. Megill again said, "You too" in what Duval construed to be an angry or upset tone. A few minutes later Duval was preparing the dining room on PVM 2 for lunch when Celina Caprisecco, Megill and Whelan came on the floor and appeared to Duval to be angry.

After lunch Megill came to Duval and said she wanted to make rounds on his assignments. During the course of the rounds Megill again said that she was surprised that he was for the Union and according to Duval raised her voice and argued about it. About 1:30 p.m. Duval was paged to the office where he found Megill and Caprisecco who had a list of alleged deficiencies they had found and told him to read it and sign it. Duval told them he would not sign because he knew they were giving him the warnings because he supported the Union. Megill then got Whelan who asked Duval what happened. Duval told her he felt they were giving him the warnings because of his union pin and support. Whelan took the warnings and tore them up and threw them in the garbage and told Duval "everything will be fine."

A few days later Director of Nursing Whelan called a meeting of all CNAs on duty in the dining room of PVM2. Whelan told the employees she did not care anything about the Union and if they wanted to choose the Union she did not care but that the Union could not do anything to them. She continued that if she wanted to fire them she had the right to do so. She admonished them to do everything they were supposed to do because she could fire them at anytime, however, they were forced to choose. Near the end of the meeting Megill spoke and again told them the only chance they had was to do their job very well and the Union could do nothing for them, because they could fire them at any time. This version is corroborated by other employees and Respondent admits that Whelan said no matter what the outcome of the union election they would still have to perform their jobs as in the past or face discharge.

Duval testified that several weeks before the August 5 election Art Dryer came on the floor as the 7 to 3 supervisor. He stated that they were often short handed and had to take care of more patients. In early July as he was walking by a patient's room in another section of the facility he observed a patient on the floor in a puddle of urine. He asked Art Dryer who was just behind him to assist in getting the man off the floor. Duval notified housekeeping to clean the urine from the floor and placed the patient in a geriatric chair. Based upon Dryer's assertion subsequently given to Duval, he passed the room again about 15 minutes later and heard the patient calling for help and asserts he found him in the urine soaked bed trying to get out. He then talked to Duval about the urine on the floor and Duval told him he had reported it to housekeeping.

Just before the shift's end Megill paged him to the office where he found Megill, Dryer, and Celina Caprisecco. Dryer

described what happened and Duval was given a warning (R. Exh. 3). Duval noted on the warning that it was not his patient and refused to sign it. Duval was written up rather than the CNA who was responsible for the patient.

Two or 3 days after the above incident Duval testified that he and an LPN Audrey White had just cleaned, bathed, and diapered a patient named Mark Herman after he had a BM. Duval then went to room 242 to care for the patient there. According to Duval, within 5 minutes there was a violent punch on the door and Duval said, "come in." Dryer entered and told Duval to leave that patient, "right now" that he had a patient who was dirty and very wet. He went to room 245 and found Herman, the patient he and White had just cleaned, wet from stomach to his shoes. He called LPN Audry White who came in and upon inspection of Herman, told Duval that he was not wet from urine. Duval said he put the clothes in a plastic bag and that they did not have the odor of urine. Duval expressed the fear to Celina that he was afraid Dryer was trying to get him in trouble because he was supporting the Union. Apparently Duval did not receive a "write-up" for this incident, but I believe it demonstrates that Respondent was harassing him because of his leadership in the union activity.

Duval acknowledges that Director of Nursing Whelan had a meeting with employees and told them she could not tell them not to speak Creole because that was their language, but not to speak Creole in front of the patients. On August 3, 2 days before the representation election, Duval was summoned over the intercom by Megill to come to her office. He went to the office and told Megill he was on his lunchbreak and she told him to come back after lunch. He returned at that time and was told by Megill that Caprisecco had given him a writeup for speaking Creole in front of the patients. He denied having done so and told Megill that during breakfast a Haitian lady from housekeeping had come up to the dining room and he was some distance away, about room 233. Upon seeing each other they waved, but exchanged no words. Duval refused to sign the form. Nothing was written in the space for "statement by employee."

I credit Duval's denial that he was speaking Creole in front of patients. By this time Duval was convinced that the Respondent was trying to find a reason to fire him and thus he would not have done anything against the rules. Moreover, Duval was precise in his recollection of what had occurred. A short time before this event Megill had told Duval that he would receive a warning everyday and after three such warnings he could he terminated.

In this regard it is also noted that Waterman conducted antiunion meetings with the employees in Creole and distributed antiunion literature in both English and Creole.

Prior to 11 p.m. on August 4, Duval telephoned Susan Fagan, the supervisor on that shift and told her he would not be at work the next day. She asked if he was sick and he told her no. He testified that he started to explain but she appeared to be busy. Duval was an observer for the Union at the election the following day.

When Duval returned to work on Monday, August 8, his next scheduled day, Art Dryer paged him to the office where he asked him to sign a written warning that Whelan had prepared stating that he had been rude to Susan Fagan when he called in. Duval asked to speak to Whelan since Megill was off. Duval went to Whelan and asked about the warning. Whelan reasserted that Duval had been rude to Fagan and the warning stayed. Whelan refused at Duval's request to call Fagan.

The following day Duval went to Fagan's office and asked if she had a problem with him. He explained to Fagan that Whelan had given him a warning for being rude to her. Fagan told him she had no problem with him that "Mrs. Whelan just got her own problem with you." She did not elaborate.

Duval testified that just before and after the election all the CNAs were very careful to be sure they did their assignments right and if one finished before others they would assist each other. On Tuesday, August 9, Duval testified that he had 11 or 12 patients because they were short handed. Near the end of the shift Art Dryer told Duval he wanted to make rounds with him. Duval testified that when they started he was very surprised to find the call lines, which were supposed to be under the patient's pillow or in easy reach, were on the floor or had otherwise been placed out of reach of the patient. He received a page to go to Megill's office where she showed him a "write-up" by Dryer because the call lines were not in reach of the patients. Duval told Megill that when he finished his rounds all the lines were where they should have been and refused to sign the write-up. Duval also told Megill that "this is a set-up" and I'll bring charges against you." As noted, I credit Duval that he was more careful with his assignments at this time because he feared the Company was trying to find a reason to fire him.

On August 13, a Saturday, Duval reported for work and while on his way from clocking in to his work assignment was observed by Supervisor Gretza Matses and was given a warning by Matses for not being on his floor. On the following day Duval talked with Matses about the writeup. Matses told Duval she had to have something on him for Saturday and Sunday or on Monday she could be in big trouble and could lose her job and she had a daughter to support. She added that she did not have a problem with Duval.

Matses testimony with respect to these events is dramatically different from Duval's. She testified that she observed Duval talking to a nurse away from his work station and she is unclear whether it was that day or the following day, Sunday. August 14 that she gave Duval the written warning. She testified that Duval became very belligerent and loud and demanded that she tear it up and that she felt intimidated or threatened by him. In any event the police were called and their report is dated August 14, 1994. Her statement in that report is totally inconsistent with her testimony on direct examination.

On cross-examination the police report was first introduced and from that it appears that she also gave a written warning to another employee, Janet Lorius, evidently for improperly parking his car. In the report she names Lorius as the perpetrator of the "verbal threats." In the report she attributes to Lorius the statements that she attributed to Duval in her testimony. The report states Matses told the officer "a co-worker threatened her life." The statement goes on:

> Matses told me that, Janno Lorius B/M 32 yoa, said to her, "I'm going to kill you!" Lorius also told Matses, "I'll feed you and you're daughter!", Matses stated that she does not know what that statement means, but felt very threatened by Lorius.
>
> Matses told me that the threats began when the CNA's formed a union. Matses told me that Lorius knows where she lives and that she had a daughter. Matses feels very intimidated and threatened by Lorius.

> Matses told me that another CNA, Ernest Duval B/M also intimidated her but has not made any direct threats.[14]

When Duval reported for work his next scheduled day Wednesday, August 17, he did not see his name on the schedule. Nevertheless, he punched in and started to take the elevator when Supervisor Susan Fagan told him not to start to work until he saw Celina Caprisecco. When Celina came in she told Duval to go to the nursing office. Caprisecco and Fagan were there. Caprisecco told him that he was fired because he threatened Gretza and that there was a police arrest order and he could not come into the facility anymore. He asked for a "paper" showing he was fired and Celina told him any more questions and she would call the police and have him put out and told Fagan to call the police. He told Celina not to call the police he would go home.

It should be noted that Janet Lorius, the man reported to police by Gretza as having actually threatened her was given only a 2-week suspension. It should further be noted that Duval's version of what transpired on August 13, between him and Gretza was never sought.

It is evident from the foregoing that the Respondent was determined to rid itself of the most vocal union supporter from the beginning. I find that the discharge of Ernest Duval was clearly for this enthusiastic support for the Union and am not convinced that Duval engaged in the conduct Respondent attributed to him and for which it contends he was discharged. Accordingly, Respondents discharge of Duval and the several written warnings that were given to him violates Section 8(a)(3) and (1) of the Act.

6. Caty Joseph—August 17

Caty Joseph started working as a CNA at King David Center sometime in 1990. She signed an 1115 card which she obtained from Pierre Exile on June 26, and started wearing the 1115 union pin about 2 months before the election. She worked the 3 to 11 p.m. shift under the supervision of Yves Waterman.

On August 4, the day before the election at about 7:30 p.m. Waterman paged Joseph to come to the office. When she arrived there he closed the door and asked her if she knew anything about the Union. She told him "No." He asked that she explain to him what the Union is. He told her the Union was not going to do anything for her but would just take money every 2 weeks from her check. She continued that he told her that whoever voted for the Union would get fired and it would be better to vote for King David.

About June 1993, Joseph started to school at North Tech and upon showing Megill a letter from her teachers stating she was in school she was permitted to report to work 8 to 10 minutes late. On about Wednesday after the election when she reported about 7 minutes late, Megill was standing by the time clock and told her she had been late the last 2 days and the next time she would terminate her.

Around August 10, Yves Waterman gave Joseph five write-ups in 1 day, three for speaking Creole and two for not giving patients showers. They were presented to her by Megill. Joseph testified that she was on break when she was speaking Creole on one occasion and another was at the end of the day. With respect to the patients she did give a shower she stated they were not on the shower chart and could bathe themselves. I shall not spend a lot of time discussing these warnings alleged to have been discriminatorily motivated in view of the fact that Joseph fatally flawed her credibility for the reasons set forth below.

On August 16, Joseph's husband wrote a note for Joseph to Lisa Megill stating in part, "I have an emergency which forces me to be out of work for three weeks." G.C. Exh. 27. She gave the note to Megill on August 17, and testified that Megill said "Okay, call me when you want to come back." A few days later Joseph called Megill and said she was ready to come back to work. Megill told her to come back in on her 3 to 11 shift. Joseph worked a few days and on September 9, her husband wrote another note to Megill for her stating in relevant part that she needed a 3-month leave of absence to take care of her child because she was having babysitting problems. (G.C. Exh. 28.) Joseph's trial testimony was that Megill again said Okay and she could call when she was ready to come back. It appears that about 2 weeks later Joseph called and told Megill she was ready to come to work. Megill told her she did not have an opening on the 3 to 11 shift, but that she could work the 11 to 7 shift. Joseph told her she could not do that because of babysitting problems. Joseph never contacted Megill again to find out about a 3 to 11 opening. Thus it is evident that Joseph was never fired.

As noted above, Joseph fatally flawed her credibility in the following manner. On September 17, within 2 hours of leaving the facility after Megill had told her it would be okay for her to take a 2-week leave, Joseph was at the Comfort Inn in West Palm Beach and gave an affidavit to the NLRB agent investigating these unfair labor practice charges. In the affidavit (R. Exh. 24) wherein she recited the above-mentioned conversations and warnings. In the last paragraph she states:

> This morning I put in a letter that I needed a leave of absence for an emergency. Lisa told me that I would be replaced and that I would have a job no more. I never took vacation before. I don't know of other people have taken leaves of absence but I have been there 4 years and never take vacation. I knew they were going to fire me anyway and it was just a matter of time for them to fire me.

In view of this credibility finding I am unable to credit Joseph in any of her testimony. Accordingly, I find the General Counsel has not established by a preponderance of the evidence any violation of the Act based on Joseph's testimony.

This finding does not mean that I credit Megill and Waterman where their testimony conflicts with Josephs.

7. Luders Esteril—August 25

Luders Esteril worked as a CNA at King David from February 1992 until August 25, 1994, when he was terminated allegedly for failing to call in when he was going to be absent on February 24. He worked the 7 a.m. to 3 p.m. shift on the first floor under the supervision of Celina Caprisecco at the time of his discharge. Esteril joined 1115 on September 14, 1993, by signing a card and wore the 115 union pin on his lapel from before the time the petition was filed until after the election on August 5, 1993.

Esteril testified that the day the petition for an election was filed Director of Nursing Whelan approached him with the petition in her hand and asked if he had signed and asked him if he had signed a card for those union people and he admitted to her that he had. He further testified that about a week before

[14] This report was written by the police officer based on what Matses told him.

the election quality assurance nurse Megill asked if he ever went to the union meetings. He told her he had and she admonished him not to listen to them because everything they said was not true. She urged him to support the Company and told him she did not want the Union. Esteril said that prior to the election he had an excellent working relationship with all his supervisors including Megill, Dryer, and Caprisecco, but after the election they began making rounds more often and more thoroughly inspected the CNA's work. On August 9, he was summoned to the office where the three supervisors mentioned above gave him a written reprimand for several alleged work deficiencies they had discovered when making rounds. Esteril either denied the offenses or his responsibility for them. He refused to sign the warning. During the 2-1/2 years Esteril had worked there he had received only one written warning which concerned the failure to clean a patient's nails.

The events leading up to Esteril's discharge are not in substantial dispute. About August 9, Esteril approached Lisa Megill and requested permission to be absent August 20 and 21. Megill told him she would try to find a replacement and that he should also look for one as it was his primary responsibility. On August 16, Esteril put his request in writing and Megill told him to continue to look for a replacement as neither of them had found one at that point. Esteril testified that at that time Megill asked him if anyone had asked him for money that morning and said she had heard they were collecting money to put him, Esteril, in the newspaper or on the radio to tell people the way she and Capresecco were treating the CNAs. All supervisors at King David maintained a call list from which they can obtain a fill in when an employee is absent on any given shift.

Esteril did not find a replacement and admittedly did not ask Megill if she had prior to his taking off from work August 20 and 21. When he returned to work he was summoned to the office by Megill and was given a writeup for no-call, no-show with the admonition that if he received another warning he would be fired. Esteril worked that shift. However, the following day he testified that at about 5 a.m. he called the facility and asked for a supervisor and was told the supervisor was busy. He testified that he told the woman with whom he was talking that he was calling in sick. He did not obtain the name of the woman and did not report for work that day.

The Respondent contends that its policy is that an employee calling in sick must speak to a supervisor. Respondent claims that it inquired of all female employee present at that time and none admitted having received a call from Esteril. When he returned to work the following day he was discharged by Art Dryer for failing to call in. It is not contended that prior to this time Esteril had any attendance problem.

The Respondent contends that it had a firm written policy concerning no call/no shows and that it had discharged other employees for failing to call in and thus its treatment of Esteril was no different and its action would have been the same absent his union activities.

The General Counsel argues that prior to the Union's winning the election Megill regarded Esteril as a very good CNA and that the warning given for his August 20 and 21 absence was in retaliation for his support of the Union. He further argues that Megill made no effort to find a replacement for Esteril since several supervisors testified to having call lists for that purpose and that there was testimony indicating there were perhaps an overabundance of CNAs in mid-August in view of the fact some were being sent home. The General Counsel also contends that in view of Megill's demonstrated union animus she should not be credited and that Esteril would not have stayed out of work without calling in in view of the warning given him on August 22. He also points out that Esteril's wife, Marie Esteril, who was discriminatorily discharged on December 9, testified that Art Dryer had told her that Esteril's support for the Union was the reason neither he nor his wife could work at King David.

I find that Respondent seized upon Esteril's conduct here as a pretext to fire him for his union activities and that the discharge violates Section 8(a)(3) and (1) of the Act.

8. Claudette DeLinois—November 4

DeLinois testified that she started work at King David in July of 1994 and went through a 1-week orientation on the 7 a.m. to 3 p.m. shift after which she worked the 11 p.m. to 70 p.m. shift under the supervision of Susan Fagan. She was not eligible to vote in the August 5 election, but asserts that almost from the beginning she wore the 1115 union pin given to her by Michelle Williams. She testified that before the election while she was on lunch break she met Betty Whelan getting off the elevator and Whelan asked her why she wore the union pin and she replied that she wore it for the union. DeLinois testified that before the election Fagan would check her rooms once a shift but after the election she would check them three times a shift.

She testified that her last day of work was November 4, at which time she was fired by Lisa Megill. She stated that on November 5, Lisa Megill called her at home and told her she needed to see her in her office. That afternoon she went to Megill's office. Megill told her that the patient in room 127 window had complained about her. DeLinois told Megill that the patient in 127 could not talk. Megill then told her it was the patient in 123 window who had reported that DeLinois had told her to turn her "call light" off and slammed the door. The following morning the nurse found dried feces on the patient. DeLinois stated that she had changed the patient three or four times during the shift.

I have some problem with DeLinois credibility, including, but not limited to her demeanor. The Respondent introduced his Respondent Exhibit 55 which is a new employee data sheet containing six names of new employees, including DeLinois which is for the pay period ending August 13 and thus would establish the DeLinois was not hired until after the August 5 election. Also Respondent's Exhibit. demonstrates that DeLinois received her first paycheck on August 13, to which the General Counsel stipulated. These exhibits demonstrates that DeLinois was not hired until after the election. Thus, Whelan could not have interrogated her about her union pin prior to the election. DeLinois' testimony to the effect that Fagan made rounds "every fifteen minutes after the election" compared to once or twice a shift prior to the election can not be given any credence in view of the fact she did not work at King David prior to the election. This testimony must have been based on what other employees had told her.

Not withstanding Respondent's extreme union animus, I do not credit DeLinois testimony that Megill told her at the discharge interview "all you Haitian people brought in the Union." This is no way lends to Megill's credibility. DeLinois was simply more unworthy of credibility than Megill in this instance.

Accordingly, I find and conclude that DeLinois was terminated because of inefficiency in her work performance and not because of her union sympathies.

9. Marie Pierre Louis—November 9

Pierre Louis was employed by King David as a CNA from October 1993 on the 3 to 11 p.m. shift to November 9, 1994, at which time she was discharged for allegedly refusing to take a patient to the bathroom. Yves Waterman was her supervisor until mid-August, after the August 5 election at which time Mary Walgousse became her supervisor. As with most of the employees Pierre Louis known support for the Union was demonstrated by wearing the 1115 union lapel pin on her uniform.

Pierre Louis had difficulty comprehending English and much of her testimony was given through the interpreter. However, her demeanor demonstrated to me that she was truthful and the fact that she had difficulty conveying what had occurred does not detract from that fact. On the other hand, Mary Walgousse, who was among the last of Respondent's witnesses to testify was entirely too glib and emphatic in her testimony which appeared to have been well rehearsed. Accordingly, I credit Pierre Louis.

Pierre Louis credibly testified that in early October after the election Walgousse knocked on the door of room 126 where Pierre Louis was bathing a patient and changing the bed. Pierre Louis asked who was there and Walgousse told her it was her supervisor. Pierre Louis told her she was bathing the patient but Walgousse came on into the room at which time Pierre Louis pulled the privacy curtain. Walgousse told Pierre Louis that she was doing a good job but that she needed her to do an even better job. The reason she needed her to do a better job was that Lisa Megill had told her every CNA on the 3 to 11 p.m. shift was for the Union. She continued to the effect that Megill had indicated they were looking for a reason to get rid of them.

Pierre Louis also testified, as did a number of other witnesses, that prior to the election there were six CNAs on their section on the 3 to 11 p.m. shift. Shortly after the election the number of CNAs was reduced to four, thus creating a heavier workload. The Respondent contends that any reduction in the staff was due to a declining patient census and the work load of each CNA remained about the same. In addition she testified that her workdays per week was reduced from 5 to 4 days.

On November 8, Walgousse testified there was an incident with a patient who complained that an aide had refused to take her to the bathroom. The patient could not identify the aide. Walgousse took two aides into the room and the patient identified Pierre Louis. Walgousse evidently made a report of the incident but did not deem it a basis for any disciplinary action at that time. However, when Pierre Louis reported for work on November 9, and started to work she was called to the nursing station. Walgousse was there but took Pierre Louis to the downstairs breakroom where she, Walgousse, told her that Lisa Megill had left a paper saying she had a complaint and to fire Pierre Louis. Pierre Louis denied refusing to take a patient to the bathroom and Walgousse told her she was sorry that she knew she was a good worker but that she had no choice since Lisa Megill had left a paper directing Walgousse to fire her.

Voluminous testimony from many witnesses, both the General Counsel's and Respondents', indicated that many of the patients there were senile and some suffered from Alzheimer's disease. Thus it may well be that the patient's complaint was not well founded nor the identification. Moreover the record discloses that CNAs were not always discharged for such alleged conduct. Indeed one example is that one employee, Margy Jeter was accused of slapping a patient and the incident was investigated by the State Attorney's office, yet Jeter was still permitted to work.

I find that Megill seized upon this alleged incident to rid Respondent of another union adherent and thus violated Section 8(a)(3) and (1) of the Act.

10. Michelle Williams—November 11

Williams worked at King David as a CNA from August 1990 until November 11, 1994, at which time she was discharged by Director of Nursing Betty Whelan for excessive call outs (absences) and "giving out information." The General Counsel alleges the discharge as a violation of Section 8(a)(3) and (1) and argues that Respondent seized on these things to fire her because she was one of the more vocal union supporters. She worked the 11 p.m. to 7 a.m. shift and at material times here under the supervision of Susan Fagan.

She signed an 1115 union card November 15, 1993 (G.C. Exh. 33), and obtained four or five cards from a union organizer which she gave to other employees. From about the time the representation petition was filed she wore the 1115 pin while at work and in addition thereto she wore an insignia stating that she was a union steward and also one stating, "Vote for 1115."

Williams' credibly testified that in mid-July as she was checking the schedule Yves Waterman told her the Union was no good and she should remove her union buttons and stop talking about it. He then made a motion as if to physically remove the buttons himself, but apparently did not touch her.

Williams admits she had received several counseling warnings during her 4 years at King David including one given her by Gretza Matses for sitting down on the job. She also admits she did not have a good attendance record throughout her employment. The employee handbook (G.C. Exh. 9) states to the effect that employees are permitted two call-ins per quarter and in excess could result in suspension or termination. Williams testified that at a meeting with the employees in June, Megill had said they were permitted three call-offs per month. Megill denied this and no other employee testified with respect to this statement. It cannot be credited. Clearly Williams was mistaken.

The Employees attendance records subpoenaed by the General Counsel; reveals that Williams did indeed have an attendance problem. In 1992 Williams had 19 call-ins and in 1993 she had 17 and the record does not reveal that the Employer took any disciplinary action against her. It is unclear as to whether the permitted call-ins are for sickness only or for any reason. Williams had a total of 14 call-ins in 1994 at the time of her discharge. One of Williams call ins which particularly irked Respondent was on August 4, the day before the election. Williams was among the first to come to the polling area to vote on August 5. She overheard Megill tell Whelan that she had called in the previous night and she was the first in line to vote and did not appear to be sick.

On August 6, Megill gave Williams a warning for excessive absences and particularly the August 4 one when she came to the election with no sign of discomfort. Williams also received another warning on August 12 alleging that she failed to do anything during the first half hour of her shift. Megill testified that in October she again reminded Williams of the absentee policy.

On November 11, Whelan called Williams in and told her she was terminated for excessive absenteeism and giving out information. Williams assumed the information she allegedly gave out to which Whelan was referring was information to the Union. However, it appears the information Whelan was referring to was information given to a local newspaper involving the death of a patient and resulted in a critical article about it in the November 6 issue. (R. Exh. 61.) Williams denied having given the information to the newspaper and Whelan does not explain why she thought it was Williams. The patient about whom the information was given had never been one of Williams' patients and thus Whelan did not posses a good-faith belief that it was Williams.

Not withstanding the policy concerning call ins in the employee handbook, it is evident the policy was not uniformly enforced. Indeed Williams and others had exceeded the permitted call ins in previous years. Indeed in 1993, Joyce Nelmons had 22 call-ins with no disciplinary action.

Indeed in 1992 and 1993 Williams absentee record was worse than in 1994 and she was not disciplined. It is noted there was no union on the scene at that time. Thus, I find that Williams discharge violates Section 8(a)(3) and (1) of the Act.

11. Carline Dorisca—December 7

The complaint alleges that Respondent violated Section 8(a)(3) and (1) of the Act by refusing Dorisca's request for a schedule change and by discharging her on December 7. Dorisca worked as a CNA for 2 years at King David and was discharged allegedly for failing to properly care for a patient assigned to her.

Dorisca's union activities consisted of signing an 1115 card; wearing an 1115 pin on her uniform at work; attending the representation hearing as a witness for the Union and acting as the union observer at the August 5 election. Dorisca testified that the day following the representation hearing Yves Waterman asked her about her attendance there and she told him he would have to talk to Director of Nursing Betty Whelan.

About 2 weeks prior to the August 5 election she submitted a request to Lisa Megill for a schedule change so she could attend a school. Dorisca wanted to work two double shifts and one single each week.[15] Dorisca and other witnesses testified to a meeting with employees the day before the election at which Whelan, Megill, and Waterman spoke. Dorisca stated that Megill told them that if the Union came in there would be no more special schedules. However, after the meeting Megill told Dorisca she could have her requested schedule change. The day after the Union won the election Megill told Dorisca her request was denied. Later Dorisca and other CNAs were sent home by Megill who told them they were over staffed.

About 2 weeks before her discharge Dorisca was told by her supervisor, Susan Fagan, that she had recommended to Megill that Dorisca be given a raise and Megill had told her to put it on hold.

Respondent contends that Dorisca was discharged on December 7 when assistant director of nurses found a patient for whom Dorisca had been responsible for on the previous shift covered by dried and caked feces and urine. Dorrett Waterman the assistant director of nurses testified that about 8 a.m. on December 7 she had occasion to see patient Virginia Reynolds in room 120. Waterman testified that when she arrived the patient was calling for help and upon pulling the covers back she found the bed to be dirty-wet and covered with feces. Waterman got charge nurse, Cassandra Mickens, and nursing supervisor Art Dryer. Waterman testified it would take several hours for feces and urine to dry to that extent. Waterman found that Dorisca had been the CNA for this patient on the 11 p.m. to 7 a.m. shift and that she had previous warnings she decided to terminate her. Mary Walgousse was told by Waterman to terminate Dorisca for this incident.

Dorisca testified that upon instructions she attempted to get a urine sample from the patient in 120 at about 6 a.m. and left the bed pan under her for about 10 minutes without success. She reported to the charge nurse who said the next shift would have to get the sample. She then returned to the patient and cleaned her and changed the bed after which she gave her patient ice and went home at 7 a.m. The CNA, Joyce Neloms, who had been on duty for an hour was not reprimanded for not have discovered the patient's condition during that time.

Lisa Megill testified at length concerning the duties of the CNAs and their standard routine at shift change. Her testimony was that the CNA whose shift had ended would do rounds of all patients, 10 to 12, with the incoming CNA. Even if that was not done the incoming CNAs first duty was to "look in " on all patients for which they were responsible. It appears from the incident report Respondent Exhibit 76 that Waterman found the patient in that condition about 8 a.m., an hour after Dorisca shift had ended. Further it appears that breakfast is served at about 7:30 a.m. Waterman's testimony that it would take several hours for feces to dry to that extent and not be detected by a CNA or nurse is almost inconceivable.

Accordingly, I find this incident was concocted, or at least greatly exaggerated to give Respondent a reason to discharge Dorisca for her union activities.

12. Monique Destine—December 9

Destine worked as a CNA at King David from October 1993 to December, 1994. Her union activity consisted of signing an 1115 card and at some point before the August 5 election she testified she wore a union button (G.C. Exh. 13).

Destine was a Seventh Day Adventist who would not work from Friday sundown until Saturday sundown. It appears that she regularly worked Sundays and Mondays and was otherwise on an "on-call basis." Destine's version of her employment is difficult to understand as her skills in English were very poor.

When she returned she telephoned Art Dryer to inform him she was ready to go back to work. Dryer told her he did not have any hours scheduled for her then but that she could call back. About December 9, Destine called Dryer again and was informed that he had hired some new people but she could go on an on-call basis as she had worked before and he would call her if he needed her. It appears that Destine never called again. It appears that the employer never completed a termination form on Destine as it had for all the other employees it terminated.

Not withstanding Respondent's union animus and egregious unfair labor practices I find the General Counsel has failed to establish a prima facie case that Destine was terminated because of her union activities. Indeed he failed to establish that she was terminated.

[15] The record reveals that prior to the election Respondent had accommodated employees requests for altered schedules in order that they may attend school.

13. Marie Esteril—December 9

M. Esteril is the wife of Luders Esteril who has been found herein to have been discriminatorily discharged on August 25. M. Esteril worked as a CNA for Respondent from October 1993 until she went on maternity leave July 12, 1994, on the 11 to 7 shift on the first floor. She never returned to work.

About 2 weeks before the August 5 election Esteril testified that Lisa Megill phoned her about the union election. During the course of the conversation Esteril stated that Megill told her . . . . " If you not vote the Union, you can save your job. If you vote the Union you can lose your job." Before going on leave Esteril's only union activity consisted of signing a card for 1115 and wearing the union button (G.C. Exh. 13). Prior to going on maternity leave Esteril's husband brought a note from her doctor stating she should go on leave until after birth.

When she voted on August 5, she was observed by Yves Waterman and Lisa Megill. Waterman asked if she was ready to come back to work. Esteril replied that she had come to vote the Union and was going home. Esteril gave birth in September. About mid-October Esteril called Megill and asked to be put on schedule. Megill replied fine.

On November 1, Esteril returned to King David for the 11 to 7 shift she looked at the schedule and did not see her name and without asking a supervisor about it she went back home. She never called anyone to find out why her name was not on the schedule. About 5 weeks later in mid-December a friend suggested that she call King David. At that time Lisa Megill had been terminated by King David and Esteril talked to Art Dryer who had been her supervisor on the night shift. Dryer did not immediately recognize the name. She explained who she was and according to Esteril Dryer said he could not do anything for her because she and her husband worked for the Union according to what Celina and Lisa had told him and he could not put her on the schedule.

Had Esteril desired to work at King David she would not have waited 5 weeks to inquire why her name was not on the schedule. The employee handbook states that 6 weeks is permitted for maternity leave. Here, Esteril's conduct persuades me that Esteril was not terminated by Respondent. Art Dryer admits to having received a call from Esteril on December 9, and testified that he told Esteril that it would take a few days to work her into the schedule. At that point Dryer says that Esteril accused him of not putting her on the schedule because she was involved in the Union. In short, I find Respondent did not terminate Esteril because of her union activity.

14. Lina Pinquiere—mid-August suspension

Pinquiere has been employed as a CNA at King David on the 3 - 11 shift since November 1992. At material times here Celina Capresecco was her immediate supervisor. Pinquiere had admittedly received several counselings about her work performance during her more than 2 years' of employment. She wore the 1115 union pin prior to the election which appears to be the extent of her union activity. During Pinquiere's shift on August 16, Capresecco told Pinquiere to put a patient back to bed Pinquiere retorted that she was picking up the dinner trays. Five to 15 minutes later Capresecco again instructed Pinquiere to put the patient to bed and Pinquiere again retorted that she was almost through picking up the trays and would put the patient to bed when she finished. Capresecco became irritated with Pinquiere's ignoring her instructions and showing that irritation told Pinquiere to clock out she was suspended for 3 days.[16]

Clearly, Capresecco considered getting the patient back to bed more important than removing the food trays at that time. It appears Pinquiere was blatantly defying her supervisor's instructions. The Respondent had discharged other employees for similar conduct. I find that Respondent did not deem Pinquiere to be an effective union advocate. Had it done so it would have terminated her. In short, I find Pinquiere's 2-day suspension was not related to her union activities and thus does not violate Section 8(a)(3) and (1) of the Act.

15. Jean J. Domond—May 24

The Government alleges that Respondent King David caused Respondent Healthcare to discharge Domond because of Domond's union activities and other unlawful reasons. The General Counsel offers Domond's testimony further in support of 8(a)(1) allegations against both Respondent's of solicitation of employees to work against the Union and offering him a $4-per-hour wage increase to assist them in defeating the Union.

Domond was hired by Healthcare in August 1991, to work in the laundry at King David. It appears that Domond was responsible for nonpersonal items, i.e., sheets, towels, diapers, and bibs while another employee was responsible for the patients personal items, i.e., clothing.

Domond signed a card for 1115 and testified he was on the organizing committee. He also wore the 1115 union pin. (G.C. Exh. 13.) He appeared at the R case hearing on behalf of 1115 one day.

Domond testified that 1 day before his discharge, in April or May as he was finishing a break, Lisa Megill called him to Betty Whelan's office. After he arrived his supervisor, Tom Rathe came in and slammed the door whereupon Megill locked it. Present then were Domond, Megill, Whelan, and Rathe. Domond testified that Megill told him she wanted to make a deal with him. He alleges that she told him that if he would assist them in getting rid of the Union she would get him a wage raise to $10 per hour. Domond was then making $6 an hour. He states he told her that all the people already knew about the Union and there was nothing he could do. All the supervisors present denied that any such incident occurred.

I do not credit Domond based on demeanor and the fact I hereafter do not credit his testimony with respect to events leading up to his discharge. In my opinion had such offer have been made Domond would have jumped at it. This was a 75-percent wage increase. Moreover, it appears that Domond was not among the more influential union supporters who might have been effective in assisting the Respondent to defeat the Union. This allegation is dismissed.

The events leading up to Domond's discharge started in mid-May. Dwanna Brown, an employee of Hospice By the Sea, was working at King David with a terminally ill patient.[16] Brown was a very credible witness and I credit her testimony in its entirety. The family of the patient with whom she was working had bought him some new clothes. His wife was coming to visit him and Brown could not locate his clothing. A CNA suggested that they might be in the laundry room, but she did not have time to get them for her. Brown went to the laun-

[16] R. Exh. 49 indicates that she was actually suspended for only 2 days.

[16] Employees of Hospice By the Sea worked at different nursing homes and hospitals with terminally ill patients.

dry room where she found Domond whom she did not recognize by name. She asked Domond about the personnel clothing a couple of times and he ignored her. She thought there might be a language barrier. She tried to get him to look on the rack of clothing there. He kept saying, "I don't know, I don't know." Brown could not determine if Domond was understanding her. Domond was folding sheets and Brown says he "just snapped" and started snapping the sheet toward her face and calling her a "bitch" and "M F" as well as "whore" all the time popping the sheet across her face. She testified that it was a small area and she couldn't get out the door. She finally caught the sheet. All the time Domond was yelling at her. A maintenance man named Walter Sterling over heard the yelling and came in and Domond stopped.

Walter paged Tom Rathe for her. She met Rathe on the first floor and they went outside where she reported to Rathe what happened. They then went back to the laundry room where Domond started yelling at Rathe. Brown also called her office to report the incident. Thereafter Brown changed the hours she worked at King David. Several employees reported to Brown that Domond had made threatening and disparaging remarks about her and Neloms testified to that affect. Brown testified that even though she changed her hours quite often she would look around to see Domond and she felt she was being stalked. Brown reported this continuing conduct to the Hospice office and to Rathe. Before Rathe could talk to Domond he received a phone call from Betty Whelan the director of nursing at King David and told him what she had heard about these incidents and that she couldn't have anyone working there who would threaten her employees.

Rathe attempted to call his manager, Tom Oettenger and Megill obtained some written statements. The decision was made to terminate Domond the next working day a Tuesday for his conduct toward Brown.

I find both King David and Healthcare had good reason to believe that Domond had engaged in the conduct set forth above.. I find he was terminated for that reason and his termination was totally unrelated to his union activity.

16. The 8(a)(2) allegation

The Government alleges that King David unlawfully supported and assisted District 6 by granting them access to its facility to hold campaign meetings while prohibiting 1115 access to the facility. Ernest Duval testified that the last week in June and the first week in July he saw District 6 Business Manager Jeffrey Metzger in the King David facility. District 6 was an intervenor in the upcoming election. Metzger was at the nurses station on PVM2 between 11 and 11:30 a.m. and also in the dining room. Metzger talked to CNAs and LPNs while on the floor and on at least one occasion brought donuts to the nurses station.

On July 2, at about 2 p.m. Supervisor Gretza Matses announced over the facility P.A. system, "attention all staff, all nursing staff, there is a mandatory meeting in the main dining room at 2:30 p.m." Duval attended and testified there were about 15 CNAs and nurses there along with Matses, Metzger stood in front and made a speech and passed out District 6 union literature. Matses asked Metzger what advantages District 6 had for the employees. Matses did not deny she attended such a meeting. Other CNAs testified to this meeting also.

Metzger testified that he was at the King David facility only once when he had a meeting with the LPNs for which District 6 was the recognized representative. However, Betty Whelan testified there was no recognition agreement between King David and District 6. Metzger admitted to having talked to some of the CNAs.

Upon learning that representatives of District 6 had been admitted to the King David facility to campaign, 1115 sent a letter to Betty Whelan requesting access to the facility stating that District 6 had been given such access to the facility to address the employees. Such permission was denied.

Respondent, King David, argues that District 6 was there in the performance of its duties as the collective-bargaining representative of the LPNs.

The evidence is convincing that Metzger was in the King David facility campaigning among the CNAs to gain support for District 6 in the up coming election. The denial of equal access to 1115 violates Section 8(a)(3) and (2) of the Act. *Castways Management*, 285 NLRB 954 (1987).

CONCLUSIONS OF LAW

1. Respondent PVM 1 Associates Inc., d/b/a King David Center and U.S. Management, Inc./I.I.M.S. Joint Employers (King David) is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent Healthcare Services Group, Inc. is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. The Union, 1115 Nursing Home Hospital and Service Employees Union-Florida (1115), is now and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

4. The Union, International Union of Industrial service Transport and Health Employees District 6, is now and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

5. The following employees of Respondent Healthcare Services Group, Inc., constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time housekeeping and laundry employees employed by Respondent at King David Center in West Palm Beach, Florida; *excluding* all other employees, guards and supervisors as defined in the Act.

6. At all times material, the Union, 1115, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit set forth in paragraph 5 above, for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

7. On or about November 10, 1994, the Union 1115 requested Respondent Healthcare to meet and bargain with it as the exclusive collective-bargaining representative in the unit, for the purpose of negotiating the terms of a collective-bargaining agreement.

8. Since on or about November 10, 1994, Respondent Healthcare has failed and refused to meet and bargain with the Union, 1115, which constitutes a violation of Section 8(a)(5) of the Act which constitutes an unfair labor practice that interferes with the free flow of commerce.

9. By engaging in the following conduct the Respondent, King David has engaged in Acts in violation of Section 8(a)(1) of the Act.

(a) By engaging in surveillance of its employee' union activities and creating the impression that its employees union activities are under surveillance.

(b) By threatening employees with discharge and/or suspension because they supported the Union and engaged in activities on behalf of the Union.

(c) By calling employees troublemakers and threatening to issue disciplinary warnings to its employees because of their activities on behalf of the Union.

(d) By threatening to change work schedules and rescinding previous accommodations it had allowed its employees for their convenience because they engaged in activities on behalf of the Union.

(e) By interrogating its employees about their union activities and such activities of other employees.

(f) By threatening its employees with unspecified reprisals because they engaged in activities on behalf of the Union.

(g) By attempting to remove union insignia from its employees uniforms.

10. By engaging in the following conduct, Respondent King David has engaged in conduct in violation of Section 8(a)(3) and (1) of the Act.

(a) By more closely scrutinizing and inspecting its employees work and imposing more onerous working conditions by increasing their work load because they supported and engaged in activities on behalf of the Union.

(b) By implementing and enforcing an overly broad rule prohibiting its employees, 95 percent of whom are Haitian, from conversing in Creole except on their breaktime and in break areas because they supported and engaged in activities on behalf of the Union.

(c) By denying its employees CarIine Dorisca a request for a schedule change because of her activities on behalf of the Union.

(d) By issuing written disciplinary warnings to its employee Ernest Duval because of his union activity.

(e) By issuing disciplinary warnings to its employees Caty Joseph, Luders Esteril, Oettelie Jean Jean-Baptiste, Michelle Williams because they engaged in activity on behalf of the Union.

(f) By suspending its employee Quettelie Jean-Baptiste for 1 week because she supported the Union and engaged in activities on behalf of the Union.

(g) By discharging and thereafter failing and refusing to reinstate its employees named below because they engaged in activities on behalf of the Union.

Jean Aliza—February 25, 1994; Lude Duval—April 21, 1994; Marie Larose—May 31, 1994; Ernest Duval—August 17, 1994; Luders Esteril—August 25, 1994; Marie Pierre Louis—November 9, 1994; Michelle Williams—November 11, 1994; and Carline Dorsica—December 7, 1994.

11. By engaging in the following conduct, Respondent has engaged in conduct in violation of Section 8(a)(2) and (1) of the Act.

By permitting representatives of International Union of Industrial Service Transport and Health Employees District 6 to come upon its promises for the purpose of attempting to organize its employees while denying 1115 Nursing Home Hospital and Service Employees Union-Florida, similar access to its premises.

12. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Healthcare engaged in conduct in violation of Section 8(a)(5) and (1) of the Act, and that King David engaged in acts that violate Section 8(a)(3), (2) and (1) of the Act, I shall recommend that both Respondents be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the purposes and policies of the Act. It is further ordered that the notice to post pursuant to this order shall be printed in both Creole and English.

Having found that King David discriminatorily discharged its employees: Jean Aliza, Lude Duval, Marie Larose, Ernest Duval, Luders Esteril, Marie Pierre Louis, Michelle Williams, and Carline Dorisca and discriminatorily suspended Quettelie Jean-Baptiste for 7 days, I shall recommend that each of them be offered immediate and full reinstatement to their former positions of employment or if those positions no longer exists, to substantially equivalent positions without prejudice to their seniority and other rights and previously enjoyed and that each of them be made whole for any loss of earnings they may have suffered by reason of the discrimination against them with interest thereon. Backpay shall be computed on a quarterly basis, less net interim earnings as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). I also order that King David expunge from all files any references to their discharges and notify them in writing that this has been done and that evidence of the unlawful actions will not be used as a basis for any future personnel actions against them.

I further recommend that the personnel files of Ernest Duval, Caty Joseph, Jean Aliza, Luders Esteril, Quettelie Jean-Baptiste, and Michelle Williams be cleaned of disciplinary warnings found above to be unlawful and that such will not be used against them and they shall be notified such action has been taken.

Inasmuch as I have found that Healthcare has failed and refused to bargain in good faith with the duly certified collective bargaining representative of its employees 1115, since November 10, 1994, it shall be ordered to, upon request bargain in good faith with 1115 on all matters relating to wages, hours and other terms and condition of employment and if agreement is reach reduce same to writing and execute same. Such bargaining obligation shall extend for 1 year from the time Healthcare commences to bargain in good faith. *Mar-Jac Poultry C.o.,* 136 NLRB 785 (1962).

Finally, King David and Healthcare shall be ordered to post separate appropriate printed notices in both Creole and English to employees, copies of which are attached hereto as "Appendix A" and "Appendix B" for a period of 60 days in order that employees may be apprised of their rights under the Act, and King David and Healthcare obligation to remedy the unfair labor practices. Both notices shall be posted at King David and Healthcare in places where notices are customarily posted in order to address each employer's specific violation.

[Recommended Order omitted from publication.]